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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. DARNELL LENTON CLIFTON, Appellant.	)	2 CA-CR 2010-0352 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200900498

Honorable Wallace R. Hoggatt, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Jeffrey L. Sparks — Phoenix
Attorneys for Appellee

John William Lovell — Tucson
Attorney for Appellant

H O W A R D, Chief Judge.

¶1 After a jury trial, appellant Darnell Clifton was convicted of transportation of a narcotic drug for sale, conspiracy to transport a narcotic drug for sale, and sale of a

narcotic drug as an accomplice, all with the intent to assist a criminal street gang, and was also convicted of assisting a criminal street gang. On appeal, Clifton argues two of his convictions violated the Double Jeopardy Clause. He also challenges the indictment, the admissibility of evidence presented at trial, and the sufficiency of the evidence against him. Because we find no reversible error, we affirm.

Factual and Procedural Background

¶2 "We view the facts in the light most favorable to sustaining the convictions." *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). On May 29, 2009, Clifton and his brother/co-defendant, Durell, met an undercover agent from the Drug Enforcement Agency and a confidential informant in a store parking lot to sell them a "bill" ("a hundred dollars . . . worth") of crack cocaine. After Clifton and Durell arrived in a Cadillac driven by Clifton, one of the brothers called the informant and asked to change the location to a grocery store parking lot. When they arrived at that parking lot, Durell entered the agent's vehicle and gave the informant a bag of crack cocaine in exchange for $100. While the sale was taking place, Clifton drove the Cadillac in slow circles around the parking lot in a manner consistent with counter-surveillance techniques used by those who sell illegal drugs. During the sale, Durell stated the driver of the Cadillac "was his little brother, he's 22 years old, and . . . very paranoid." After the sale, Durell left the agent's vehicle and returned to the Cadillac.

¶3 After a joint trial with his brother, the jury found Clifton guilty of transportation of a narcotic drug for sale, aiding the sale of a narcotic drug, conspiracy,

and assisting a criminal street gang. The jury found he had committed the transportation, aiding-the-sale, and conspiracy offenses with the intent to assist a criminal street gang. The trial court sentenced him to concurrent terms, the longest of which are nine years' imprisonment. This appeal followed.

Double Jeopardy

¶4 Clifton argues his convictions for transportation of a narcotic drug for sale and for aiding or agreeing to aid in the sale of a narcotic drug violate the Double Jeopardy Clause of the United States Constitution.[1] He first contends that he cannot be convicted as both the principal and an accomplice on the same offense, and then that the convictions are multiplicitous because "possession of the cocaine for sale is a lesser-included offense of transportation of the cocaine for sale."

¶5 Clifton concedes that he did not raise this argument on these counts in the trial court and that he therefore has forfeited the right to seek relief for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005) (failure to object to alleged error in trial court results in forfeiture of review for all but fundamental error). Fundamental error requires the defendant to establish that: 1) an error occurred; 2) the error was fundamental; and 3) the error resulted in prejudice. *See id*. However, a double jeopardy violation is fundamental error.

[1]Although Clifton bases his argument on the Double Jeopardy clauses of both the United States and Arizona constitutions, because both provide the same protection against double jeopardy, we need only evaluate Clifton's argument under the federal constitution. *See State v. Eagle*, 196 Ariz. 188, ¶ 5, 994 P.2d 395, 397 (2000).

State v. Siddle, 202 Ariz. 512, n.2, 47 P.3d 1150, 1153 n.2 (App. 2002). We review de novo whether convictions violate double jeopardy. *See id.* ¶ 7.

¶6 The Double Jeopardy Clause prohibits "multiple punishments for the same offense." *State v. Powers*, 200 Ariz. 123, ¶ 5, 23 P.3d 668, 670 (App. 2001), *approved*, 200 Ariz. 363, 26 P.3d 1134 (2001). An indictment is defective as multiplicitous when it "charges a single offense in multiple counts." *Id.* In determining whether an indictment is multiplicitous, we must determine whether each offense requires evidence the other offense does not. *State v. Barber*, 133 Ariz. 572, 576, 653 P.2d 29, 33 (App. 1982), *approved*, 133 Ariz. 549, 653 P.2d 6 (1982).

¶7 We first note that Clifton bases his argument on an incorrect recitation of his convictions. He contends "possession of the cocaine for sale is a lesser-included offense of transportation of the cocaine for sale" and relies on a case in which the court concluded that a defendant's conviction of both transportation of drugs for sale and possession of the same drugs for sale violated the Double Jeopardy Clause. *See State v. Chabolla-Hinojosa*, 192 Ariz. 360, ¶ 8, 965 P.2d 94, 96 (App. 1998). But Clifton was not convicted of possession of a narcotic drug for sale but instead of transporting a narcotic drug for sale and acting as an accomplice to Durell's sale of a narcotic drug.

¶8 The offense of transportation for sale requires proof the defendant knowingly: 1) transported; 2) for sale; 3) a narcotic drug. A.R.S. § 13-3408(A)(7); *see State v. Cheramie*, 218 Ariz. 447, ¶ 10, 189 P.3d 374, 376 (2008). The offense of sale of a narcotic drug requires the defendant knowingly exchange anything of value for a

narcotic drug. *See* A.R.S. §§ 13-3401(32); 13-3408(A)(7). Thus the transportation for sale charge requires the defendant have transported the narcotic, which the sale charge does not. And the sale charge requires a defendant exchange something of value for a narcotic drug, which the transportation for sale charge does not. Because each count requires proof the other does not, Clifton was not convicted as both a principal and accomplice of the same offense. Furthermore, the indictment here was not multiplicitous, and Clifton's convictions for transportation of a narcotic drug for sale and sale of a narcotic drug were not multiplicitous, *see Barber*, 133 Ariz. at 576, 653 P.2d at 33, and did not violate the Double Jeopardy Clause, *see Powers*, 200 Ariz. 123, ¶ 5, 23 P.3d at 670. No error occurred, much less fundamental error.

Admission of Photographs and Testimony Regarding Photographs

¶9 Clifton argues the trial court erred by allowing the state to admit various photographs, claiming that the state did not present sufficient foundation for the photographs and that they were inadmissible hearsay, irrelevant, and unfairly prejudicial. We review the trial court's rulings on the relevance and admissibility of evidence for an abuse of discretion. *State v. Rutledge*, 205 Ariz. 7, ¶ 15, 66 P.3d 50, 53 (2003).

¶10 A proponent of evidence must establish foundation for it by first authenticating or identifying the evidence. Ariz. R. Evid. 901(a).[2] The proponent does this by producing evidence "sufficient to support a finding that the item is what the

[2]Although the Arizona Rules of Evidence have been amended since the time of Clifton's trial, because the amendments were intended to be stylistic only unless otherwise noted, we will refer to the current rules. *See State v. Sosnowicz*, 629 Ariz. Adv. Rep. 20, n.12 (Ct. App. Mar. 8, 2012).

proponent claims it is." *Id.* Rule 901(b)(1) states that authentication may be accomplished when a witness with knowledge testifies that "an item is what it is claimed to be." The trial court does not determine the authenticity of the evidence but instead determines "'whether evidence exists from which the jury could reasonably conclude that it is authentic.'" *State v. King*, 226 Ariz. 253, ¶ 9, 245 P.3d 938, 942 (App. 2011), *quoting State v. Lavers*, 168 Ariz. 376, 386, 814 P.2d 333, 343 (1991). A flexible approach that allows the "trial court to consider the unique facts and circumstances in each case . . . and the purpose for which the evidence is being offered" is appropriate when the court is deciding whether evidence was properly authenticated. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 14, 186 P.3d 33, 37 (App. 2008).

¶11 To be properly admissible, photographic evidence must be a reasonably faithful representation of the object depicted and the photograph must assist the jury in understanding the testimony or in evaluating the issues presented. *Id.* ¶ 7. "And, although 'the individual who took the photographs need not be the person who verifies them at trial, and the verifying witness is not required to have been present when the photographs were taken,' the verifying witness must 'attest that the photographs accurately portray the scene or object depicted.'" *Id., quoting Lohmeier v. Hammer*, 214 Ariz. 57, ¶ 8, 148 P.3d 101, 105 (App. 2006).

¶12 At trial, the court admitted eight photographs of members of "Hollywood," which the state alleged was a criminal gang, bearing the Hollywood tattoo and displaying the Hollywood hand symbol. Officer Jeremy Wolfe identified all of the individuals

pictured in the eight photographs and testified each fairly and accurately depicted what it portrayed.

¶13 The trial court did not err in admitting the state's photographic evidence over Clifton's objection to foundation. The state presented sufficient foundation by providing Wolfe's testimony that each of the photographs was a fair and accurate depiction of the scene or object portrayed as it related to the issues in the case, whether Hollywood was a criminal gang. Clifton argues there was insufficient foundation because "[t]here was no testimony as to when the photographs were taken, the circumstances under which they were taken, or by whom they were taken." However, these attributes are not important to the purpose for which the photographs were admitted. Additionally, the person who took the photographs need not be the witness who verifies them at trial, and the verifying witness is not required to have been present when the photographs were taken. *See Haight-Gyuro*, 218 Ariz. 356, ¶ 7, 186 P.3d at 35. Clifton's arguments go to the weight of the evidence, not to the issue of foundation. Accordingly, the court did not err in finding sufficient foundation existed to admit the photographs into evidence.

¶14 Clifton further claims the photographs were inadmissible hearsay because they were "admitted for the truth of the matter asserted . . . that Hollywood was a criminal street gang." Clifton also argues that testimony about the individuals in the photographs, their membership status in Hollywood and involvement in starting Hollywood, hand signs they displayed in the photographs and background on the

meaning of the displayed hand signs was inadmissible hearsay, lacked foundation as to the witnesses' personal knowledge, was irrelevant, and was unduly prejudicial.

¶15 At trial, other than objecting to the foundation of the photographs admitted, Clifton only objected to the relevance of the people displayed in the photograph admitted as Exhibit 7. The photograph showed three members of the Hollywood gang together. Officer Wolfe testified that at the time the photograph was taken one of the men was the leader of Hollywood, but after his death, another person in the photograph became the new leader. This photograph, in relation to the other evidence, was relevant to establish that Hollywood was a criminal street gang by showing an ongoing association of the members of Hollywood. *See* A.R.S. § 13-105(8); Ariz. R. Evid. 401 (evidence relevant when "it has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action"). Therefore, the trial court did not abuse its discretion in admitting Exhibit 7.

¶16 Clifton, however, did not object at trial to the admission of the other photographs and evidence on the grounds now raised. Because an objection on one ground does not preserve the issue on another ground, Clifton has failed to preserve the other objections he argues on appeal. *See State v. Lopez*, 217 Ariz. 433, ¶¶ 4-5, 175 P.3d 682, 683-84 (App. 2008) (objection for foundation does not preserve hearsay objection). Therefore, Clifton must show the existence of fundamental error to receive relief on these claims. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005) (defendant's failure to object to alleged trial error limits review to fundamental error and

defendant has burden of persuasion). Although Clifton argues the "evidence admitted, but not objected to, constitutes fundamental error," he merely mentions this claim in the heading for his argument. Because Clifton does not argue or cite to any facts or legal authority to demonstrate fundamental error occurred, he has waived fundamental error review and we decline to address his claim. *See State v. Moody*, 208 Ariz. 424, 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. Failure to argue a claim usually constitutes abandonment and waiver of that claim.'"), *quoting State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989).

Evidence of a Criminal Street Gang

¶17 Clifton next argues the trial court committed reversible error in admitting evidence of incidents on May 12, 2006 and June 23, 2009 involving other members of Hollywood, contending "[t]here was no proper purpose" for the admission of these incidents.[3] Because the trial court admitted these incidents as relevant to the gang statutes, A.R.S. §§ 13-105(8), (9)[4] and 13-2321, we will presume Clifton is challenging their admission under these statutes. We review a trial court's evidentiary ruling for an

[3]Clifton fails to cite any authority for his assertions, and we could consider the argument waived. *See State v. Moody*, 208 Ariz. 424, n.9, 94 P.3d 1119, 1147 n.9 (2004) (failure to argue claim merely mentioned constitutes abandonment and waiver of claim). However, we may exercise our discretion and resolve an otherwise waived issue on its merits. *See State v. Smith*, 203 Ariz. 75, ¶ 12, 50 P.3d 825, 829 (2002).

[4]Although the legislature has modified § 13-105 since Clifton's offense, none of the changes are substantive. *Compare* § 13-105 *with* 2008 Ariz. Sess. Laws, ch. 301, § 10.

abuse of discretion. *See State v. Davolt*, 207 Ariz. 191, ¶ 60, 84 P.3d 456, 473 (2004). An appellate court will not "second-guess a trial court's ruling on the admissibility or relevance of evidence." *State v. Rodriguez*, 186 Ariz. 240, 250, 921 P.2d 643, 653 (1996).

¶18 Section 13-2321 prohibits assisting a criminal street gang and provides that "[a] person commits assisting a criminal street gang by committing any felony offense, whether completed or preparatory for the benefit of, at the direction or in association with any criminal street gang." Subsection E allows for the admission of evidence about the "[u]se of a common name or common identifying sign or symbol" to be considered when proving the existence of, or membership in, a criminal street gang. § 13-2321(E).

¶19 Section 13-105(8) defines a criminal street gang as "an ongoing formal or informal association of persons in which members or associates individually or collectively engage in the commission, attempted commission, facilitation or solicitation of any felony act and that has at least one individual who is a criminal street gang member." An individual is a "criminal street gang member" if at least two of the following seven criteria applies: "(a) [s]elf-proclamation," "(b) [w]itness testimony or official statement," "(c) [w]ritten or electronic correspondence," "(d) [p]araphernalia or photographs," "(e) [t]attoos," "(f) [c]lothing or colors," and "(g) [a]ny other indicia of street gang membership." § 13-105(9). Evidence of a gang's criminal activity is relevant to show it is a criminal street gang. *State v. Baldenegro*, 188 Ariz. 10, 15, 932 P.2d 275, 280 (App. 1996).

¶20 Count six of the indictment charged Clifton with assisting a criminal street gang, requiring the state to prove that Hollywood was a criminal street gang as defined by § 13-105(8). The trial court ruled that a May 12, 2006 traffic stop resulting in the arrest of three members of Hollywood and a June 23, 2009 sale of a firearm by a member of Hollywood went to the issue of whether there was a criminal street gang, finding the incidents admissible. The court further explained that it was for the jury to determine whether a criminal street gang existed and whether Clifton had participated in it "in some fashion."[5]

¶21 The evidence of these incidents is intrinsic to the charged offense of assisting a criminal street gang. *See State v. Herrera*, 226 Ariz. 59, ¶ 12, 243 P.3d 1041, 1046 (App. 2010) ("Evidence of other acts also may be admitted if the evidence is intrinsic to the charged offense. This ground for admitting other-acts evidence is independent of, and without regard to, Rule 404, [Ariz. R. Evid.,] the exceptions the rule provides, and an analysis under the rule."). "Other act evidence is intrinsic when 'evidence of the other act and evidence of the crime charged are inextricably intertwined or both acts are part of a single criminal episode or the other acts were necessary preliminaries to the crime charged.'" *State v. Nordstrom*, 200 Ariz. 229, ¶ 56, 25 P.3d 717, 736 (2001), *quoting State v. Dickens*, 187 Ariz. 1, 18 n.7, 926 P.2d 468, 485 n.7 (1996); *see also Baldenegro*, 188 Ariz. at 15-16, 932 P.2d at 280-81 (evidence of gang

[5]The court gave the jury an appropriate limiting instruction, explaining in relevant part that evidence of other acts may only be considered either "to show the absence of mistake or mere presence in the charged incident," or "to show the existence of a criminal street gang."

activity by other members of criminal gang intrinsic because "'inextricably intertwined'" with crimes of "assisting and participating in a criminal syndicate for the benefit of a criminal street gang").

¶22 To prove Clifton's guilt under § 13-2321(B), it was necessary for the state to introduce evidence of the incidents on May 12, 2006 and June 23, 2009 to show the existence of a criminal street gang, Clifton's association with individuals who were known members of that gang, and that those individuals had engaged in illegal activity. The evidence was intrinsic because it is inextricably intertwined with the crime charged in Count Six and necessary to prove the enhancement to the drug count. *See Baldenegro*, 188 Ariz. at 15-16, 932 P.2d at 280-81. The trial court did not abuse its discretion in admitting the evidence.

Other Act Evidence

¶23 Clifton also appears to argue the admission of July 9, 2009 and June 4, 2009 incidents violated both his and Durell's presumption of innocence under the Due Process Clause of the Fourteenth Amendment. Clifton bases his claim on the fact that, at the time of trial in this case, he had not been convicted of the July 9, 2009 sale of cocaine and Durell also had not been convicted of the June 4, 2009 sale of cocaine.

¶24 Clifton, however, has failed to identify an objection below on these grounds and, because we find none, he has forfeited this claim absent fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). However, it is the defendant's burden to establish fundamental error, *id.*, and Clifton

merely mentions "fundamental error" and fails to argue such error occurred. Because he has not met his burden of persuasion, we consider his claims waived and decline to address them. *See State v. Moody*, 208 Ariz. 424, n.9, 94 P.3d 1119, 1147 n.9 (2004).[6]

Indictment on Conspiracy

¶25 Clifton next argues he received insufficient notice of the charge against him on the count of conspiracy to transport a narcotic drug for sale because the indictment did not name the person with whom he conspired and did not include an overt act. The state points out Clifton never objected to the indictment based on sufficiency of notice, and Clifton has not contested this by filing a reply brief.

¶26 Because Clifton has not identified an objection in the record and we find none, he has forfeited the right to seek relief for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). Furthermore, because he does not argue on appeal that the error is fundamental, we could find this argument waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (fundamental error argument waived on appeal). However, the Due Process Clause of the Arizona Constitution requires an indictment give a defendant sufficient notice of the charges against him. *See McKaney v. Foreman ex rel. Cnty. Of Maricopa*,

[6]In the fact section of his opening brief, Clifton mentions five other incidents the trial court ruled admissible at a motions hearing prior to trial, but he does not cite to the record as to when these incidents were admitted at trial and fails to make any arguments regarding them. Merely mentioning an argument in "the 'fact' section of [Appellant's] brief" without making any argument regarding it "'constitutes abandonment and waiver of that claim.'" *Moody*, 208 Ariz. 424, n.9, 94 P.3d at 1147 n.9, *quoting State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989). Accordingly, we will not address these incidents.

209 Ariz. 268, ¶¶ 13-14, 100 P.3d 18, 21 (2004). Therefore, we will consider whether fundamental error occurred. *See State v. Smith*, 203 Ariz. 75, ¶ 12, 50 P.3d 825, 829 (2002) (court may consider waived argument in its discretion).

¶27 Rule 13.2(a), Ariz. R. Crim. P., requires an indictment set forth a sufficient factual statement to give notice of the charges against a defendant. An indictment "must 'fairly indicate[] the crime charged; state[] the essential elements of the alleged crime; and [be] sufficiently definite to apprise the defendant so that he can prepare his defense to the charge.'" *McKaney*, 209 Ariz. 268, ¶ 14, 100 P.3d at 21, *quoting State v. Marquez*, 127 Ariz. 98, 101, 618 P.2d 592, 595 (1980) (alterations in *McKaney*). Further, the indictment "'must be read in the light of the facts known by both parties.'" *State v. Far W. Water & Sewer Inc.*, 224 Ariz. 173, ¶ 36, 228 P.3d 909, 923 (App. 2010), *quoting State v. Magana*, 178 Ariz. 416, 418, 874 P.2d 973, 975 (App. 1994).

¶28 The indictment charged that on May 29, 2009, Clifton committed a class two felony when he "conspired with one or more persons to transport a narcotic drug for sale and drove the delivery car, to wit: a 1996 Cadillac Sedan with Arizona license plate number . . . in furtherance of such conspiracy." It also listed the applicable statutes. In other counts, the indictment charged Clifton with aiding or agreeing to aid his brother Durell in the sale of a narcotic drug, providing the means or opportunity for his brother to sell a narcotic drug, and charged both brothers with assisting a criminal street gang, all on the same date as the conspiracy charge. Although other defendants are charged with offenses in the same indictment, only Clifton and Durell's offenses are alleged to have

occurred on the same date. And in his closing argument Clifton contended the state had brought "four different charges, essentially accusing him of the same thing[—t]aking his brother to the Target and Fry's parking lot, dropping him off, and then picking him up again."

¶29 Clifton has not directed us to any authority requiring that an indictment for conspiracy name the alleged co-conspirator. Any such argument therefore has been waived. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (issue waived when argument insufficient to permit appellate review). Furthermore, based on the facts stated in the indictment and the surrounding circumstances known to all parties, Clifton had sufficient notice the conspiracy to transport a narcotic charged the conspiracy with his brother on May 29, 2009, *see Far W. Water & Sewer Inc*., 224 Ariz. 173, ¶ 37, 228 P.3d at 923, and plainly was able to prepare a defense to the charge, *see McKaney*, 209 Ariz. 268, ¶ 14, 100 P.3d at 21. Thus, no error occurred, much less fundamental error.

¶30 Clifton asserts "[i]t would be disingenuous for the State to argue that the agreement was between" him and his brother, when Durell had not been charged with conspiracy. He alleges that because the grand jury did not indict Durell for conspiracy, it "did not find sufficient evidence . . . and, thus, [Durell] cannot be deemed a co-conspirator." However, Clifton cites to no authority supporting this argument. Thus, it is waived. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *Bolton*, 182 Ariz. at 298, 896 P.2d at 838. Moreover, the prosecutor has discretion to determine which charges to file with the

grand jury, *State v. Tsosie*, 171 Ariz. 683, 685, 832 P.2d 700, 702 (App. 1992), and Clifton provides no evidence a conspiracy charge was even submitted against Durell.

Sufficiency of the Evidence

¶31 Clifton further contends insufficient evidence supported his conviction for conspiracy to transport a narcotic drug for sale.[7] We examine the sufficiency of the evidence to determine whether substantial evidence supports the jury's verdict. *State v. Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d 912, 913 (2005).

¶32 "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). Substantial evidence "may be either circumstantial or direct." *State v. Henry*, 205 Ariz. 229, ¶ 11, 68 P.3d 455, 458 (App. 2003). We will reverse a conviction "only if 'there is a complete absence of probative facts to support [the jury's] conclusion.'" *State v. Carlisle*, 198 Ariz. 203, ¶ 11, 8 P.3d 391, 394 (App. 2000), *quoting State v. Mauro*, 159 Ariz. 186, 206, 766 P.2d 59, 79 (1988).

¶33 To convict a defendant of conspiracy, the state must prove that a person, intending to aid in committing an offense, "agree[] with one or more persons that at least one of them . . . will engage in conduct constituting the offense and one of the parties commits an overt act in furtherance of the offense." A.R.S. § 13-1003(A). To prove the

[7]Although Clifton acknowledges he was convicted of conspiracy to transport drugs, he later incongruously argues the state produced insufficient evidence of a conspiracy to sell drugs. We will review his actual conviction for fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005).

offense of transportation for sale the state must show a person knowingly: 1) transported; 2) for sale; 3) a narcotic drug. A.R.S. § 13-3408(A)(7); *see State v. Cheramie*, 218 Ariz. 447, ¶ 10, 189 P.3d 374, 376 (2008). Conspiracy, including the required agreement, need not be proved by direct evidence, but may be established by circumstantial evidence. *State v. Fischer*, 219 Ariz. 408, ¶ 46, 199 P.3d 663, 675 (App. 2008).

¶34 Viewed in the light most favorable to upholding Clifton's convictions, *see State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006), the evidence established Clifton drove Durell to a parking lot to meet with an undercover agent and then, after a phone call to the agent informing him of a location change, drove Durell to another parking lot. While Durell sold the cocaine to the agent, Clifton slowly circled through the parking lot in a manner consistent with counter-surveillance. And Durell told the agent his brother was "very paranoid." Based on the circumstantial evidence of Clifton's driving from one location to another, his driving in a manner consistent with counter-surveillance, and Durell's comment, the jurors reasonably could have concluded that Durell and Clifton had formed an agreement to transport the cocaine for the purpose of selling it to the agent and that Clifton had committed an overt act by driving the car to the sale.[8] *See Spears*, 184 Ariz. at 290, 908 P.2d at 1075.

¶35 Clifton argues the state "failed to specifically allege an overt act" in furtherance of the conspiracy as demonstrated by the prosecutor's statement in closing

[8]We need not consider Clifton's argument that evidence about other acts was not admitted to establish proof of a conspiracy, because we determine sufficient evidence supported his conviction without considering any other act.

argument that "we don't know what act that might have been in this case." However, the state continued, "But we know that there were acts because they decided to drive together. They agreed to drive to [the store] to drop off the crack to" the agent. Thus, sufficient evidence supported the jury's finding of an overt act in furtherance of the conspiracy. *See id.*

Hearsay Evidence

¶36 Clifton finally contends the trial court erred by admitting Durell's statement to the agent that the driver of the Cadillac was Durell's "little brother, he's 22 years old, and . . . he's very paranoid." He asserts the statement is inadmissible as a statement of a co-conspirator because Durell was not charged with conspiracy and because the statement was not made in furtherance of a conspiracy to sell drugs.

¶37 Because Clifton did not object to the statement, we review for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005) (failure to object to alleged error in trial court results in forfeiture of review for all but 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.'" *Id*. ¶ 19, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). The defendant has the burden to show both that the error was fundamental and that it caused him prejudice. *Id*. ¶¶ 19-20.

¶38 Under Rule 801(d)(2)(E), Ariz. R. Evid., a statement by a co-conspirator made "during the course and in furtherance of the conspiracy" is not hearsay. Such a statement may be admitted when the state has established proof of a conspiracy and that the declarant and the defendant are co-conspirators. *State v. Dunlap*, 187 Ariz. 441, 458, 930 P.2d 518, 535 (App. 1996). A statement is in furtherance of the conspiracy as long as there is some reasonable basis to conclude it furthered the conspiracy according to the intent of the declarant.[9] *Id*. It is not necessary that a conspiracy be charged as long as there is sufficiently reliable proof of a conspiracy. *State v. White*, 168 Ariz. 500, 506, 815 P.2d 869, 875 (1991), *abrogated on other grounds by State v. Salazar*, 173 Ariz. 399, 416, 844 P.2d 566, 583 (1992).

¶39 After Durell got into the agent's car and transferred the cocaine, he told the agent to drive, following the Cadillac. While they were driving in circles, following the Cadillac, Durell made the statement about his brother being paranoid. When the Cadillac stopped, the agent stopped his car and Durell got back into the Cadillac. The evidence suggests sufficient proof of a conspiracy between Clifton and Durell to sell a narcotic drug. Durell's statement reasonably could have been intended to alleviate any concerns his apparent buyer might have had about driving in circles or to convince him to follow

[9]Although Clifton appears to argue the admission of Durell's statement violated his rights under the Confrontation Clause, the United States Supreme Court has commented that "an incriminating statement in furtherance of the conspiracy would probably never be . . . testimonial" and that "[t]he co-conspirator hearsay rule does not pertain to a constitutional right . . . ." *Giles v. California*, 554 U.S. 353, 375 n.6 (2008). In fact, in *Crawford v. Washington*, 541 U.S. 36, 56 (2004), the court declared a statement by a co-conspirator was "by [its] nature . . . not testimonial."

the Cadillac. In either case, Durell's statement reasonably intended to further the conspiracy to sell the cocaine and was admissible as a statement by a co-conspirator. *Dunlap*, 187 Ariz. at 458, 930 P.2d at 535. The trial court did not err fundamentally or otherwise by failing sua sponte to exclude the statement. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607.

Conclusion

¶40 For the foregoing reasons, we affirm Clifton's convictions and sentences.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge