NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK
JUL 11 2013
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. DANIEL MONTES RENTERIA, Appellant.	)	2 CA-CR 2011-0342 2 CA-CR 2012-0276 (Consolidated) DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. CR20100889001 and CR20112715001

Honorable Richard S. Fields, Judge
Honorable Charles Sabalos, Judge

AFFIRMED IN PART AND VACATED IN PART

Thomas C. Horne, Arizona Attorney General
By Joseph T. Maziarz and Jonathan Bass
Tucson
Attorneys for Appellee

Natasha Wrae
Tucson
Attorney for Appellant

M I L L E R, Judge.

¶1 Daniel Renteria was convicted after jury trials in two different causes of negligent homicide and various drug offenses. He appealed the convictions in both

causes and we have granted his request to consolidate the appeals. Renteria claims the trial court erred with respect to certain evidentiary rulings, as well as pre- and post-trial motions. For the reasons stated below, we affirm in part and vacate in part.

Factual and Procedural Background

¶2 Viewed in the light most favorable to sustaining the verdicts, *see State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008), the evidence presented during the murder trial established the following. In March 2010, Renteria killed two men outside a residence. Renteria believed one of the victims, J.M., had molested his son and the other, R.R., had threatened to kill him and his son if the police were notified. He approached the residence with the intention of telling the men to stay away from his family, but shot and killed both because he saw them approach his vehicle in a menacing manner and felt threatened.

¶3 Renteria was charged with two counts of manslaughter for the killing of J.M. and R.R. Mistrials were declared in the first three trials on the manslaughter charges because the juries were unable to reach a decision. In the fourth trial, the jury acquitted Renteria of manslaughter as to J.M, but convicted him of the lesser-included offense of negligent homicide as to R.R.

¶4 While the final homicide trial was pending in August 2011, Renteria was arrested for selling heroin to an undercover law enforcement officer. After a jury trial in May 2012, he was found guilty of sale of a narcotic drug and possession of drug paraphernalia, and the trial court sentenced Renteria to a four-year minimum prison term

for the manslaughter conviction. In June 2012, the court sentenced Renteria to a mitigated prison term of 6.5 years for the sale and/or transfer of a narcotic and a mitigated term of 2.75 years for possession of drug paraphernalia, to be served concurrently with the term imposed on the manslaughter conviction.[1]

¶5 Renteria timely appealed his convictions and sentences. As we previously stated, we granted his motion to consolidate the appeals.

Discussion

Homicide Case

Knapp Counsel

¶6 Renteria first argues the trial court erred in limiting the role of Natasha Wrae, the attorney hired by his relatives, to acting as an "intermediary" because she declined to file a general appearance notice. He asserts the trial court frustrated the purpose and utility of *Knapp* counsel, referring to *Knapp v. Hardy*, 111 Ariz. 107, 523 P.2d 1038 (1974), by refusing to let Wrae draft and file motions with the endorsement of appointed public defender Paul Skitzki. Renteria further argues the court "created more expense of both time and money by the public defender" when it struck Wrae's motion to modify and required the attorney of record to re-file it. Renteria asks this court to "find error" and to "issue an Opinion clarifying the issue."

¶7 As Renteria raises these arguments for the first time on appeal, we review for fundamental error. *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607

[1]There were other charges and convictions that are not the subject of this appeal and are not discussed further.

(2005). Fundamental error is that which goes to the foundation of the case, denies the defendant a fair trial, and denies the defendant a right essential to his defense. *Id.* "To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id*. ¶ 20. Renteria has not argued or established fundamental error and, accordingly, his claims are waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (fundamental error waived if not argued). Because Renteria's claim involves his right to counsel, a fundamental constitutional right, we have examined the record for error that can be categorized as fundamental. *See State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error if it sees it), and *State v. McLemore*, 230 Ariz. 571, ¶¶ 14, 16, 288 P.3d 775, 779-80 (App. 2012) (right of counsel is a fundamental constitutional right).

¶8 Renteria was represented by appointed counsel Paul Skitzki from the Pima County Public Defender's Office. Not long after Skitzki was appointed, Wrae filed a "Special Notice of Appearance/Association Pursuant to *Knapp*," and a motion to modify conditions of release; Skitzki then filed a motion to withdraw the Pima County Public Defender's Office as counsel pursuant to A.R.S. § 11-587 and Rule 6.3, Ariz. R. Crim. P. At a subsequent hearing, Wrae informed the trial court that "at this point" she was not entering a formal appearance. The court denied Skitzki's motion to withdraw. The court also struck the motion to modify conditions of release because Wrae was not the attorney

of record, finding "[s]he didn't have the authority to file the motion, not having entered a general appearance." Neither Wrae nor Skitzki objected to the court's ruling.

¶9 Skitzki adopted and re-filed the motion to modify conditions of release and the motion was granted. A few days later, Skitzki and Wrae filed a stipulation for substitution of counsel enabling Wrae to represent Renteria as attorney of record. The court entered an order substituting Wrae for Skitzki.

¶10 Under *Knapp*, retained counsel is permitted to associate with appointed counsel provided that "assisting" counsel be "made a counsel of record with reciprocal rights and duties under" the rules of procedure and "subject to the direction of the court." 111 Ariz. at 111, 523 P.2d at 1312. Here, Renteria never had *Knapp* counsel because Wrae declined to enter a formal appearance and be made attorney of record. Thus, the trial court did not err at all, much less commit error that affected the foundation of case, deprived Renteria of a right essential to his defense, or made it impossible for him to have had fair trial, *see Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607, by denying the motion to withdraw, striking the motion to modify, and permitting Skitzki, Renteria's sole attorney of record, to re-file the motion to modify under his name.

Limiting Number of Defense Witnesses

¶11 Renteria next asserts the trial court committed reversible error by precluding a defense witness from testifying at trial and limiting the number of defense character witnesses. We review the court's evidentiary rulings for an abuse of discretion. *State v. Superior Court*, 128 Ariz. 583, 585, 627 P.2d 1081, 1083 (1981).

¶12 The trial court granted the state's motion to preclude J.M.'s sister from testifying, finding it irrelevant and cumulative. She would have testified about J.M.'s "reputation for being a burglar, for being a menace and for being a drug addict." The motion was renewed and denied before the fourth trial.

¶13 The trial court precluded the evidence after questioning its relevance and finding the testimony would be cumulative. Renteria does not cite any authority stating that this type of testimony is admissible. From the record before us, it appears that any relevance of such testimony would have been attenuated. The court did not abuse its discretion by precluding this minimally probative and cumulative evidence under Rule 403, Ariz. R. Evid. *See State v. Machado*, 224 Ariz. 343, ¶ 48, 230 P.3d 1158, 1175 (App. 2010) (no abuse of discretion in precluding minimally probative and cumulative character evidence).

¶14 In a related argument, Renteria suggests the trial court erred by limiting the number of witnesses testifying about Renteria's character, "necessitating reversal and remand." Because the argument is raised for the first time on appeal, we review for fundamental error. *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. Renteria has failed to argue on appeal that the alleged error was fundamental and prejudicial, and we have not found any error that can be so characterized. *See Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d at 140; *see also Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d at 650. Consequently, we need address this issue no further.

The Victims' Criminal Histories

¶15 Renteria argues the trial court erred when it granted the state's motion in limine, precluding him from introducing evidence of the victims' criminal histories. He argues the criminal histories were "proper other-acts evidence that should have been admitted to corroborate [Renteria's] statement to the police," citing *State v. Fish*, 222 Ariz. 109, 213 P.3d 258 (App. 2009). The court permitted Renteria to testify that he believed J.M. had a previous criminal history but precluded any specific information about the criminal record. The court denied Renteria's motions to reconsider its ruling. We review a court's decision to admit or preclude evidence for an abuse of discretion. *See State v. Davis*, 205 Ariz. 174, ¶ 23, 68 P.3d 127, 131 (App. 2002).

¶16 In *Fish*, the defendant presented evidence at trial that when he had encountered the victim in a remote wooded area, the victim's two barking and growling dogs had run toward him. 222 Ariz. 109, ¶ 2, 213 P.3d at 261-62. The defendant fired a warning shot into the ground to disperse the dogs, and the victim responded by yelling threats while running at the defendant "with his eyes crossed and looking crazy and enraged." *Id.* ¶¶ 2-3. The defendant shot and killed the victim. *Id.* ¶ 3. At trial, the defendant argued he had acted in self-defense, but the jury found him guilty of second-degree murder. *Id.* ¶ 5.

¶17 On appeal, this court reversed on the ground that, inter alia, the trial court had failed to adequately instruct the jury on self-defense. *Id.* ¶ 57. We further discussed the admissibility of evidence regarding the victim's prior acts of violence and aggression.

Id. ¶¶ 25-54. Although this court did not reach a final decision on the admissibility of this evidence, we noted that the evidence could be admissible "to rebut the State's argument that Defendant fabricated or exaggerated the Victim's acts on the date of the shooting," subject to the court "balancing the probative value of the specific act evidence against any undue prejudice and confusion under Rule 403." *Id.* ¶¶ 46, 50. The victim's prior acts in *Fish* related to conduct that was virtually identical to the defendant's description of the victim's actions just before the shooting. Consequently, such evidence was viewed as "highly probative of the veracity of Defendant's description of what he faced on the day of the shooting." *Id.* ¶ 49, 53.

¶18 This court's observation in *Fish* did "not mean that in any self-defense claim prior acts of a victim unknown to the defendant at the time of the alleged crime are always admissible to corroborate the defendant's claim." *Id.* ¶ 49. Here, unlike in *Fish*, Renteria's description of the victims' conduct just before the shooting differed greatly from the conduct that gave rise to the burglary and theft convictions. Moreover, to the extent the victims' criminal histories could be viewed as having some relevance in terms of corroborating Renteria's testimony, the trial court reasonably concluded that any such relevance was substantially outweighed by the danger of unfair prejudice and confusion of the issues. On this record, the court did not abuse its discretion.

R.R.'s Mental Abilities

¶19 Renteria argues the trial court improperly denied his motion to preclude evidence of R.R.'s mental abilities. At a pretrial hearing, the court ruled that the state

would be permitted to elicit testimony from R.R.'s family about his general overall mental condition, but the family would be prohibited from giving a diagnosis. The argument is moot because no evidence related to R.R.'s mental condition was admitted at trial.

¶20 Renteria points to the state's cross-examination of a special education teacher during which the prosecutor had asked whether she knew R.R. attended "special ed[ucation] his entire formal education." The witness responded in the negative. The prosecutor then asked, "And 'special ed' is special education designed to assist people who are slower . . . is that correct?" Renteria objected and, after a bench conference, the trial court sustained his objection. This exchange does not support Renteria's argument that the court allowed the state to introduce improper evidence of R.R.'s mental abilities.

¶21 Relying on the affidavit of Juror #12, which Renteria had attached to his motion for new trial based on jury and prosecutorial misconduct, Renteria contends the jury had considered R.R.'s mental abilities. The trial court cannot consider the subjective motives or the mental processes of a juror. Ariz. R. Crim. P. 24.1(d) ("No testimony or affidavit shall be received which inquires into the subjective motives or mental processes which led a juror to assent or dissent from the verdict.") Moreover, Renteria's recorded interview with police, which he stipulated could be admitted as an exhibit, likely provided the only evidence remotely related to R.R.'s mental abilities: "I know [R.R.'s] not really all there, but I know he's a lot smarter than you would think."

Evidence J.M. Molested Renteria's Son

¶22 Renteria argues the trial court erred in granting the state's motion to preclude him from introducing evidence that J.M. had molested Renteria's son, which included DNA[2] results, and the boy's statements to a forensic interviewer and family members. He contends, as he did below, such evidence should have been admitted to corroborate his testimony and statements to police. He again relies on *Fish* to support this proposition. 222 Ariz. 109, ¶ 41, 213 P.3d at 271. In its answering brief, the state contends the argument is moot because Renteria was acquitted of the charge related to J.M. and such evidence was irrelevant with respect to the homicide of R.R.

¶23 The trial court granted the state's motion to preclude information about the molestation unknown to Renteria at the time of the shootings. The ruling was conditioned upon the state's avowal that it would concede during closing argument that Renteria "in his own mind had good reason to believe the molestation occurred and that there is good reason to believe it may have occurred" and that the state would not object to Renteria's asserting the same.

¶24 Renteria's reliance on *Fish* is misplaced. In *Fish*, the defendant's claim of self-defense was critical and there were no eyewitnesses. 222 Ariz. 109, ¶ 41, 213 P.3d at 272. This court noted the victim's specific prior-act evidence was relevant to rebut the argument that the defendant had exaggerated the victim's actions and "to corroborate the Defendant's description of what he faced just prior to the shooting." *Id.* ¶ 46.

[2]Deoxyribonucleic Acid.

Accordingly, such specific act evidence "would have been admissible subject to Rule 403 balancing." *Id.*

¶25 Here, the proffered molestation evidence did not corroborate Renteria's description of J.M.'s actions just prior to the shooting, nor did the molestation evidence relate to an element of his self-defense. Moreover, the trial court's ruling was conditioned upon the state's avowal that it would not challenge Renteria's belief that J.M. had molested his son or that the molestation occurred. The court did not err in precluding the proffered evidence.

¶26 Renteria argues in the alternative that the trial court's preclusion of this evidence denied him the right to present a complete defense and the right to a fair trial. But a defendant's rights such as these are subject to "'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *State v. Prasertphong*, 210 Ariz. 496, ¶ 26, 114 P.3d 828, 834 (2005), *quoting Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *see also State v. Dickens*, 187 Ariz. 1, 14, 926 P.2d 468, 481 (1996) ("Although a defendant has a fundamental constitutional right to confront witnesses and present a defense, the right is limited to the presentation of matters admissible under ordinary evidentiary rules, including relevance."), *abrogated on other grounds by State v. Ferrero*, 229 Ariz. 239, 274 P.3d 509 (2012). The exclusion of this evidence pursuant to established rules of evidence did not, without more, deprive Renteria of the right to present a defense. Thus, we reject this argument as well.

Dismissal of the Case on Due Process Grounds

¶27 Renteria next argues the trial court erred by denying his motions to dismiss based on due process because "the considerable expense, prejudice and anxiety" he experienced outweighed any competing interests the state may have had in continuing to prosecute him. We review the denial of a motion to dismiss for an abuse of discretion. *State v. Huffman*, 222 Ariz. 416, ¶ 5, 215 P.3d 390, 393 (App. 2009).

¶28 A defendant's due process rights have been safeguarded as long as the trial court has considered the relevant competing interests of the parties in light of the particular circumstances of each case. *Huffman*, 222 Ariz. 416, ¶ 15, 215 P.3d at 396. In denying the motions to dismiss that Renteria filed after the second and third trials, the court considered all of the relevant competing interests of Renteria and the state in light of the facts and circumstances of this case. The court referred generally to the interests that the parties had noted in their memoranda and during the hearings on the motions, including the interests of the victims in a final verdict and changing evidentiary issues from trial to trial. The record supports the court's ruling.

¶29 Renteria further argues the trial court's ruling did not contain sufficiently specific factual findings. He concedes, however, that the law does not require the court to set forth the specific factors and reasons for the ruling. *See Huffman*, 222 Ariz. 416, ¶ 18, 215 P.3d at 397. Thus, the court did not abuse its discretion in denying Renteria's motions to dismiss on the ground of due process.

Renteria's Recorded Interview with Police

¶30 Renteria asserts he was forced to testify because the trial court erred in sustaining the state's pre-trial objection to the video recording of his police interview. The state contends the argument is moot because before closing arguments the parties stipulated to the admission of the video recording as an exhibit. We conclude the court did not err in precluding Renteria's exculpatory statements to police as inadmissible hearsay.

¶31 "An 'exculpatory statement' is a statement which tends to justify, excuse, or exonerate the defendant from alleged fault or guilt." *State v. Barger*, 167 Ariz. 563, 567, 810 P.2d 191, 195 (App. 1990), *quoting State v. Cobb*, 2 Ariz. App. 71, 73, 406 P.2d 421, 423 (1965). When offered by the declarant, an exculpatory statement is inadmissible unless it qualifies as non-hearsay or falls within a recognized exception to the hearsay rule. *See Barger*, 167 Ariz. at 566-67, 810 P.2d at 194-95. Here, Renteria told police after the incident that he had believed J.M. was molesting his son. Such statements were exculpatory because they were uttered in justification of his conduct. *Barger*, 167 Ariz. at 567, 810 P.2d at 195. Renteria argues that the video recording should be admissible under the hearsay catch-all exception, reasoning that he was unavailable under Rule 804, Ariz. R. Evid., because he had the right to remain silent at trial. He principally relies upon *State v. Ruelas*, 165 Ariz. 326, 798 P.2d 1335 (1990), for the proposition that unusual circumstances may require use of the catch-all exception. It is not unusual for a defendant to decide not to testify, and exercise of that right does not

make the defendant unavailable. *See State v. Pandeli*, 200 Ariz. 365, ¶ 23, 26 P.3d 1136, 1144 (2001), *vacated in part on other grounds*, *Pandeli v. Arizona*, 536 U.S. 953 (2002). Unless a defendant's hearsay statements qualify under a recognized exception to the hearsay rule, they are inadmissible. *State v. Wooten*, 193 Ariz. 357, ¶ 47, 972 P.2d 993, 1002 (App. 1998). The trial court did not err in sustaining the state's objection to admission of the police interview video during Renteria's case-in-chief.

Motion for New Trial

¶32 Renteria next argues the trial court erred by denying his motion for a new trial, which was based on alleged instances of prosecutorial misconduct and juror misconduct. He claimed the prosecutor had committed misconduct by (1) improperly arousing the passions or prejudices of the jury; (2) inducing jury nullification; (3) "sandbagging" by arguing that Renteria did not raise self-defense until he testified; (4) wearing an American flag lapel pin; (5) misstating the law; and (6) improperly referring to Renteria's punishment. In addition, Renteria contended in his motion that jurors were guilty of misconduct because they had discussed punishment while deliberating.

Prosecutorial Misconduct

¶33 Because Renteria did not object to the first five alleged instances of prosecutorial misconduct at trial, raising them for the first time in his motion for a new trial, we review these claims only for fundamental error. *See State v. Pandeli*, 215 Ariz. 514, ¶ 7, 161 P.3d 557, 564 (2007); *see also Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115

P.3d at 607. Renteria does not argue any error was fundamental, and we find none that can be so characterized. *See Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d at 140; *see also Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d at 650. Therefore, we will not consider them further.

¶34 Because Renteria did raise at trial the final claim of misconduct, which was based on the prosecutor's improper reference to punishment, we review the claim for an abuse of discretion. *See State v. Hansen*, 156 Ariz. 291, 297, 751 P.2d 951, 957 (1988) (trial court is in best position to determine whether attorney's remarks require mistrial, and its decision will not be disturbed absent plain abuse of discretion).

¶35 In reviewing claims of prosecutorial misconduct, our "focus is on the fairness of the trial, not the culpability of the prosecutor." *State v. Bible*, 175 Ariz. 549, 601, 858 P.2d 1152, 1204 (1993). "[Prosecutorial] [m]isconduct alone will not cause a reversal, but only where the defendant has been denied a fair trial as a result of the actions of counsel." *State v. Hallman*, 137 Ariz. 31, 37, 668 P.2d 874, 880 (1983). "To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d 1184, 1191 (1998), *quoting Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974).

¶36 Renteria contends the prosecutor engaged in misconduct during his rebuttal argument when he called upon the jury to hold Renteria "accountable for what he did." The prosecutor continued, stating, "Let the punishment fit the crime. The severity of the

penalty for a misdeed or wrongdoing should be reasonable and proportionate to the severity of the infraction." The trial court sustained Renteria's objection.

¶37 The record does not support Renteria's claim that he was denied a fair trial. Renteria has not shown how these comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *DeChristoforo*, 416 U.S. at 643. The trial court sustained Renteria's objection to the statement in question. The jury was properly instructed not to consider punishment and we presume the jury follows the court's instructions. *State v. Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d 833, 847 (2006).

Juror Misconduct

¶38 Renteria also argued in his motion for a new trial that he had been prejudiced by the jury's consideration of his likely punishment. In support of this claim, Renteria submitted affidavits from two jurors. Both jurors stated the jury foreman had commented during deliberations that should the jury find Renteria guilty of negligent homicide, Renteria likely would be sentenced to time served or to one or two years in prison. We review the denial of a motion for a new trial based upon juror misconduct for an abuse of discretion. *State v. Garcia*, 141 Ariz. 580, 583, 688 P.2d 206, 209 (App. 1984).

¶39 A jury cannot impeach its own verdict. *State v. Paxton*, 145 Ariz. 396, 397, 701 P.2d 1204, 1205 (App. 1985). "[J]uror affidavits in support of a motion for new trial are admissible only on the issues of jury misconduct specified in Rule 24.1(c)(3)[, Ariz. R. Crim. P]." *State v. Walker*, 181 Ariz. 475, 483-84, 891 P.2d 942, 950-51 (App. 1995).

Here, the affidavits did not involve juror misconduct specified by Rule 24.1(c)(3), but rather, each inquired into the "subjective motives or the mental processes" that led to the juror's verdict. Thus, the jurors' affidavits could not be considered, and the trial court did not abuse its discretion in denying Renteria's motion for a new trial. *See* Ariz. R. Crim. P. 24.1(d); *see also Walker*, 181 Ariz. at 484, 891 P.2d at 951.

The Drug Case

Motion for New Trial

¶40 Renteria argues the trial court erred by denying his motion for a new trial based on a duplicitous indictment, deficient jury instructions, and prosecutorial misconduct. He further asserts the cumulative effect of these errors caused him substantial prejudice and denied him a fair and impartial trial. Because these grounds were raised for the first time in his motion for a new trial, we review only for fundamental error. *Pandeli*, 215 Ariz. 514, ¶ 7, 161 P.3d at 564.

Duplicitous Indictment

¶41 Renteria was charged with and convicted of sale and/or transfer of a narcotic drug in violation of A.R.S. § 13-3408(A)(7). He seems to argue that both the charge and the indictment were duplicitous. Renteria contends *State v. Brown*, 217 Ariz. 617, 177 P.3d 878 (App. 2008), which is controlling, was erroneously decided. For the reasons set forth below, we disagree.

¶42 Renteria was charged with one count of sale and/or transfer of a narcotic drug. A duplicitous charge exists "[w]hen the text of an indictment refers only to one

criminal act, but multiple alleged criminal acts are introduced to prove the charge." *State v. Klokic*, 219 Ariz. 241, ¶ 12, 196 P.3d 844, 847 (App. 2008). A duplicitous indictment, on the other hand, "charges 'two or more distinct and separate offenses in a single count.'" *Id.* ¶ 10, *quoting State v. Schroeder*, 167 Ariz. 47, 51, 804 P.2d 776, 780 (App. 1990).

¶43 Here, neither the charge nor the indictment was duplicitous. The charge is not duplicitous because the text of the indictment clearly refers to "sale and/or transfer of a narcotic drug" and the record reflects evidence regarding that charge established only a single criminal act had been committed. The indictment is not duplicitous because, as we held in *Brown*, the terms "sale" and "transfer" in § 13-3408(A)(7) are different ways of committing the same offense, rather than two separate offenses, when a single transaction is involved. *See* 217 Ariz. 617, ¶ 11, 177 P.3d at 882. Thus, Renteria fails to establish the indictment or the charge was in error.

Jury Instructions

¶44 Renteria argues the trial court erred in failing to instruct the jury on the definition of "sale." He acknowledges he did not request the instruction during trial, therefore forfeiting all but fundamental error. *See State v. McMurry*, 184 Ariz. 447, 451, 909 P.2d 1084, 1088 (App. 1995) (defendant's failure to object at trial to error or omission in jury instructions forfeits issue absent fundamental error). Although Renteria does not explicitly argue the alleged errors are fundamental, *see Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d at 140, he asserts the cumulative effect of these errors caused

him substantial prejudice and denied him a fair and impartial trial. Therefore, we have reviewed the record for fundamental error and found none.

¶45 At the hearing on Renteria's motion for a new trial regarding this issue, the trial judge recalled that counsel had agreed, possibly in chambers, that an instruction on sale was unnecessary. Defense counsel could not recall discussing the topic and the prosecutor agreed with the trial judge's recollection.[3] Regardless of what was discussed during trial, it is clear Renteria neither offered a sale instruction nor objected to the failure to give a sale instruction as required by Rule 21.3(c), Ariz. R. Crim. P.

¶46 In the absence of a specific jury instruction for "sale," we presume the jury applied the ordinary definition. *See State v. Barnett*, 142 Ariz. 592, 594, 691 P.2d 683, 685 (1984) (court need not define word where term has no technical meaning peculiar to the law and is one commonly understood by those familiar with the English language); *cf. State v. Korzep*, 165 Ariz. 490, 493, 788 P.2d 831, 834 (1990) (when word in statute is undefined, courts apply ordinary meaning). If the statutory definition and the ordinary definition are essentially the same, there is no fundamental error arising out of the failure to provide the statutory definition. *See State v. Zaragoza*, 135 Ariz. 63, 66, 659 P.2d 22, 25 (1983).

¶47 The statutory definition of "'[s]ale' or 'sell' means an exchange for anything of value or advantage, present or prospective." A.R.S. § 13-3401(32). An ordinary definition of sale is "[t]he exchange of goods or services for an amount of

[3]Although jury instructions were discussed at the start of the second day of trial, it appears the majority of jury instructions were settled in chambers off the record.

money or its equivalent." *The American Heritage Dictionary* 1547 (5th ed. 2011). The ordinary definition is arguably more favorable to the Renteria because the statutory definition is not limited to money or its equivalent. Therefore, the trial court's failure to instruct on sale did not involve error going to the foundation of the case nor was Renteria denied a right essential to his defense. *See Zaragosa*, 135 Ariz. at 66, 659 P.2d at 25.

Prosecutorial Misconduct

¶48 Renteria argues that the prosecutor's lapel flag pin coupled with his correcting Renteria's incorrect statement of law during closing arguments resulted in substantial prejudice "denying [Renteria] a fair and impartial trial."

¶49 We first note that Renteria has not included the closing arguments from the drug-offense case in the record on appeal. On claim of error the record before us must contain "the material to which [he] take[s] exception." *State v. Zuck*, 134 Ariz. 509, 512-13, 658 P.2d 162, 165-66 (1982); *see also State v. Jessen*, 130 Ariz. 1, 8, 633 P.2d 410, 417 (1981) (appellate counsel must ensure "any document necessary" to appellate argument included in record on appeal); Ariz. R. Crim. P. 31.8(a)(1). "[M]atters [that] are not included in the record on appeal . . . will be presumed to support the action of the trial court." *Zuck*, 134 Ariz. at 513, 658 P.2d at 166; *see also State v. Brown*, 188 Ariz. 358, 359, 936 P.2d 181, 182 (App. 1997). Additionally, Renteria does not support this argument with pertinent citations to authorities or statutes required by Rule 31.13(c)(1)(vi), Ariz. R. Crim. P. The issue is waived. *State v. Sanchez*, 200 Ariz. 163, ¶ 8, 24 P.3d 610, 613 (App. 2001).

Vindictive Prosecution

¶50 Renteria argues that the state engaged in vindictive prosecution, warranting dismissal of the indictment. He contends the state prosecuted him vindictively for the drug offenses because he asserted his right to trial in the homicide case. Because Renteria raises this claim for the first time on appeal, we review only for fundamental error. *Henderson*, 210 Ariz. 561, ¶ 22, 115 P.3d at 608. Renteria again has failed to argue fundamental error and we find no error that can be so characterized. *Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d at 650. Thus, his claim of vindictive prosecution is waived. *Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d at 140.

Criminal Restitution Order

¶51 Although Renteria has not raised the issue on appeal, we do find fundamental error associated with the criminal restitution order (CRO). *See* A.R.S. § 13-805;[4] *see also Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d at 650 (court will not ignore fundamental error when it finds it). In the sentencing minute entry for the homicide case, the trial court ordered that "all fines, fees, assessments and/or restitution [be] reduced to a Criminal Restitution Order, with no interest, penalties or collection fees to accrue while [Renteria] is in the Department of Corrections." The sentencing minute entry for the drug case contained a similar order. The trial courts' impositions of CROs before the

[4]Section 13-805, A.R.S., has been amended three times since the homicide offenses and once since the drug offenses. *See* 2012 Ariz. Sess. Laws, ch. 269, § 1; 2011 Ariz. Sess. Laws, ch. 263, § 1 and ch. 99, § 4. We separately apply the version in effect at the time of the homicide, *see* 2005 Ariz. Sess. Laws. Ch. 260, § 6, and the drug offense, *see* 2011 Ariz. Sess. Laws, ch. 263, § 1 and ch. 99, § 4. *State v. Lopez*, 231 Ariz. 561, n.1, 298 P.3d 909, 910 n.1 (App. 2013).

expiration of Renteria's sentence "'constitute[d] an illegal sentence, which is necessarily fundamental, reversible error.'" *State v. Lopez*, 231 Ariz. 561, ¶ 2, 298 P.3d 909, 910 (App. 2013), *quoting State v. Lewandowski*, 220 Ariz. 531, ¶ 15, 207 P.3d 784, 789 (App. 2009). This remains true even though the courts ordered that the imposition of interest be delayed until after Renteria's release. *See id.* ¶ 5.s

Disposition

¶52 For the foregoing reasons, we affirm Renteria's convictions and sentences, including the restitution award, and vacate each CRO.

/s/ Michael Miller
MICHAEL MILLER, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

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