IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ARMANDO DUARTE ISLAS JR.,
Appellant.

No. 2 CA-CR 2014-0442
Filed July 14, 2015

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20142017002
The Honorable Carmine Cornelio, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Diane Leigh Hunt, Assistant Attorney General, Tucson
Counsel for Appellee

Robert A. Kerry, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Judge Howard authored the decision of the Court, in which Presiding Judge Vásquez and Judge Kelly[1] concurred.

H O W A R D, Judge:

¶1 Following a jury trial, Armando Duarte Islas Jr. was convicted of one count of sale of a narcotic drug, heroin, in an amount greater than one gram. On appeal, he argues the admission of statements made by an informant during recorded telephone calls and of statements made by his co-defendant during the recorded drug transaction violated the Confrontation Clause of the Sixth Amendment of the United States Constitution. For the following reasons, we affirm.

Factual and Procedural Background

¶2 "We view the facts and all reasonable inferences therefrom in the light most favorable to upholding the verdicts." *State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999). An informant working with federal and tribal law enforcement called Islas on the telephone to arrange the purchase of an "eight ball"[2] of heroin. Islas offered to sell the heroin to the informant for $140, and they arranged to meet at a carwash to conduct the sale. The informant and a special agent with the Department of Homeland Security went to the carwash, where they purchased approximately 3.29 grams of heroin from Islas's co-defendant, Aurelio Felix. Immediately after the sale, law enforcement arrested both Islas and Felix in an alley behind the carwash.

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[1]The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and the supreme court.

[2]An "eight ball" is an eighth of an ounce, approximately 3.5 grams.

¶3 Islas was indicted on and convicted of one count of sale of a narcotic drug in violation of A.R.S. § 13-3408(A)(7). The trial court sentenced him as a repetitive offender to an enhanced, presumptive 15.75-year term of imprisonment. We have jurisdiction over his appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 13-4033(A)(1).

Recorded Statements by Informant

¶4 Islas first argues the trial court violated his confrontation rights by allowing the admission of recorded statements made by the informant to Islas during their telephone calls arranging the drug sale because the statements were testimonial statements, as defined in *Davis v. Washington*, 547 U.S. 813 (2006), the informant did not testify at trial, and Islas was denied the opportunity to cross-examine him. He only objected to the admission of the recorded telephone calls on foundation grounds, however, and did not raise the Confrontation Clause issue. Thus, he has forfeited review of the issue for all but fundamental, prejudicial error.[3] *See State v. Lopez*, 217 Ariz. 433, ¶¶ 4, 6, 175 P.3d 682, 683-84 (App. 2008).

¶5 Under fundamental error review, the defendant bears the burden to show that the error was both fundamental and prejudicial. *State v. Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d 601, 607 (2005). To show the error was fundamental, the defendant must demonstrate that the error "'go[es] to the foundation of the case, . . . takes from the defendant a right essential to his defense, [and is] 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). And to show prejudice in the context of erroneously admitted evidence, the defendant must show "that a

[3]The state contends Islas failed to argue fundamental error sufficiently and thereby waived this claim. *See State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989); *see also State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008). Although Islas's argument is minimal, we conclude it is sufficient to preserve fundamental error review.

reasonable jury, reviewing the appropriate evidence, could have reached a different result." *State v. Kinney*, 225 Ariz. 550, ¶ 21, 241 P.3d 914, 921 (App. 2010).

¶6 "Regardless of how an alleged error ultimately is characterized, however, a defendant on appeal must first establish that some error occurred." *State v. Diaz*, 223 Ariz. 358, ¶ 11, 224 P.3d 174, 176 (2010). Islas contends the informant's recorded statements were testimonial because "the purpose of the recording of [the informant's] phone calls with . . . Islas was to prepare for 'later criminal prosecution,'" quoting *Davis*, 574 U.S. at 822, and "the [s]tate's use of [the informant's] phone calls at trial was an 'out-of-court substitute for trial testimony,'" quoting *State v. Shivers*, 230 Ariz. 91, n.4, 280 P.3d 635, 637 n.4 (App. 2012). Although "[w]e generally review a trial court's ruling on the admissibility of evidence for a clear abuse of discretion[,] . . . we review de novo challenges to admissibility based on the Confrontation Clause." *State v. Bennett*, 216 Ariz. 15, ¶ 4, 162 P.3d 654, 656 (App. 2007) (citation omitted).

¶7 Out-of-court statements are testimonial when "the circumstances objectively indicate . . . that the primary purpose of the [statements] is to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 574 U.S. at 822; *see also Ohio v. Clark*, ___ U.S. ___, ___, 135 S. Ct. 2173, 2179-80 (2015) (primary purpose test requires objective analysis of all relevant factors). Here, the informant's statements were an integral part of a conversation that itself was the criminal act of offering to sell heroin. *See Davis*, 574 U.S. at 826-27 (distinguishing nontestimonial statements that describe events as they happen from testimonial statements that seek to establish facts about a past crime); *United States v. Tolliver*, 454 F.3d 660, 665 (7th Cir. 2006) ("[U]nlike a witness giving testimony, [speaker] was not recounting past events on these tapes but was rather making candid, real-time comments about drug transactions in progress."); *see also* § 13-3408(A)(7). The informant's statements did not establish or prove past events and therefore were not testimonial. *See Davis*, 574 U.S. at 822.

¶8 Furthermore, "[t]he Supreme Court has made plain that the Confrontation Clause is not violated by use of a statement to

prove something other than the truth of the matter asserted." *State v. Smith*, 215 Ariz. 221, ¶ 26, 159 P.3d 531, 539 (2007), *citing Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004). Statements admitted to provide context for a defendant's admissions are not testimonial hearsay statements that implicate the Confrontation Clause because they are not offered for their truth. *See State v. Roque*, 213 Ariz. 193, ¶ 70, 141 P.3d 368, 389 (2006) (defendant's wife's statements used by police during videotaped interrogation of defendant not barred by Confrontation Clause); *cf. State v. Martin*, 225 Ariz. 162, ¶ 20, 235 P.3d 1045, 1049-50 (App. 2010) (right to confront witness not implicated when interviewer's statements from videotaped interview of minor victim introduced only to provide context to victim's statements).

¶9 The informant's statements during the telephone calls were not "'solemn declaration[s] or affirmation[s] made for the purpose of establishing or proving some fact.'" *Davis*, 547 U.S. at 824, *quoting Crawford*, 541 U.S. at 51. In fact, many of the informant's statements, such as his statements explaining that he needed the heroin for a camping and fishing trip, were intentionally false and only intended to elicit incriminating responses from Islas. These false statements could not have been offered for their truth but only to provide context for Islas's agreement to provide the informant with an "eight ball" of heroin in exchange for $140.

¶10 Islas also contends that the state, in its opening statement, told the jury that it would "'hear in this first phone call . . . , [the informant] talks to [Islas] and they make an agreement that [Islas] will supply [him] with an eight ball'" and that, by this statement, "the jury [was] being asked to believe [the informant] made the deal." But the informant's agreement to a deal was not something that needed to be believed. Rather, his agreement was a verbal act, and the state properly could have offered the statement to show only that the statement had been made. *See State v. Nightwine*, 17 Ariz. 499, 502, 671 P.2d 1289, 1292 (App. 1983) ("Neither a hearsay nor a confrontation question arises when evidence has been admitted solely for the purpose of proving that certain words were spoken."). Further, the state also properly could have offered the statement of agreement to show its effect on Islas. *See State v.*

Hernandez, 170 Ariz. 301, 306, 823 P.2d 1309, 1314 (App. 1991) ("Words offered to prove the effect on the hearer are admissible when they are offered to show their effect on one whose conduct is at issue.").

¶11 Thus, the informant's statements were not testimonial hearsay statements, and their admission as part of the recorded telephone calls did not violate the Confrontation Clause. *See Davis*, 574 U.S. at 822; *Smith*, 215 Ariz. 221, ¶ 26, 159 P.3d at 539; *Roque*, 213 Ariz. 193, ¶ 70, 141 P.3d at 389. Islas has failed to show any error, fundamental or otherwise, occurred. *See Diaz*, 223 Ariz. 358, ¶ 11, 224 P.3d at 176; *Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607.

¶12 Islas also fails to show he suffered prejudice as a result of being unable to cross-examine the informant. *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607. The only prejudice he alleges to support his claim of fundamental error [4] is simply that the informant's statements "introduced by audio recording [were] the most damning evidence in the case," that "[t]he importance of the evidence became clear early in the trial when the prosecutor made [the state's] [o]pening [s]tatement," and that he "never had a chance to confront [the informant]." But he does not explain how he would have avoided conviction if the informant's statements had not been admitted into evidence, particularly in light of his own admissible statements in the recorded calls stating the price of the heroin and instructing the informant on the location of the drug sale. *See Kinney*, 225 Ariz. 550, ¶ 21, 241 P.3d at 921; *see also* Ariz. R. Evid. 801(d)(2)(A). Further, Islas does not explain what testimony he believes he would have been able to develop had he been afforded the opportunity to cross-examine the informant concerning his recorded statements.

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[4]In his opening brief, Islas concludes that the alleged error here is fundamental after citing the standard for structural error articulated in *Henderson*. 210 Ariz. 561, ¶ 12, 115 P.3d at 605. Structural error and fundamental error are different types of error implicating different standards of appellate review. *State v. Valverde*, 220 Ariz. 582, ¶¶ 9-10, 12, 208 P.3d 233, 235-36 (2009).

Recorded Statements by Co-Defendant

¶13 Islas further argues the trial court violated the Confrontation Clause by allowing the admission of Felix's statements in an audiovisual recording of the drug sale because Felix did not testify at trial and Islas thereby was denied the opportunity to cross-examine him. Islas concedes that he did not object to the admission of the audiovisual recording containing these statements and thereby has forfeited review of this issue for all but fundamental error. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. But he makes no argument explaining how admission of this audiovisual recording and Felix's statements were fundamental error or how he suffered prejudice as a result of their admission. Because he fails to argue fundamental error, he has waived review of the issue entirely. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008).

Disposition

¶14 For the foregoing reasons, we affirm Islas's conviction and sentence.