IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

DANNY ALAN MARLO,
Appellant.

No. 2 CA-CR 2016-0053
Filed January 12, 2017

Appeal from the Superior Court in Cochise County
No. CR201500300
The Honorable Wallace R. Hoggatt, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Tanja K. Kelly, Assistant Attorney General, Tucson
Counsel for Appellee

Harriette P. Levitt, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Howard and Judge Vásquez concurred.

E C K E R S T R O M, Chief Judge:

¶1 Appellant Danny Marlo was convicted after a jury trial of transportation of marijuana for sale and sentenced to a minimum, four-year prison term. On appeal, he argues the trial court committed fundamental, prejudicial error in permitting hearsay testimony. He also maintains the state presented insufficient evidence to establish proper venue in Cochise County, also causing fundamental error. We affirm Marlo's conviction and sentence.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdict, *see State v. Brown*, 233 Ariz. 153, ¶ 2, 310 P.3d 29, 32 (App. 2013). At around 6:00 p.m. on April 29, 2014, a detective with the Arizona Department of Public Safety (DPS) saw Marlo driving a modified flatbed truck on highway 191 near Douglas, Arizona. The modifications made to the truck suggested it contained a concealed compartment, and the detective requested assistance from a DPS patrol officer. The officer also followed Marlo, and stopped him for traffic violations after he left the highway and turned onto Davis Road.[1]

¶3 As Marlo acknowledges on appeal, he "gave . . . officers a suspicious explanation of where he had been and what he was doing," telling them he had driven the truck from Benson to Douglas in order to sell it on behalf of its registered owner, but,

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[1]Specifically, the officer stopped Marlo for traffic violations at milepost 11 on Davis Road.

because the prospective buyer never appeared, he was returning the truck to Benson.[2] Marlo told officers he had waited at Douglas's historic railway station for over three hours. But the DPS detective testified the railway station no longer exists, as it now houses the Douglas Police Department headquarters. The detective, whose office is near that headquarters, said he had not seen the truck in the adjacent parking lot during the time frame Marlo identified.[3]

¶4 Marlo consented to a search of the vehicle, and, after DPS officers were joined by a Cochise County Sheriff's Deputy and his canine officer, they discovered a sixteen-foot-long hidden compartment containing 268.2 pounds of marijuana separated into 158 bundles. United States Border Patrol Agent Reginaldo Ruiz later investigated a receipt, also found in the truck, for purchases made at a Tucson gas station on April 28 or 29. According to Ruiz, a gas station surveillance video showed Marlo parked at the pumps for about an hour, then entering a restroom, where he was joined by other men, then exiting the restroom, fueling the truck, and purchasing some food. Ruiz said he asked the gas station clerk how Marlo paid for the gas and was told he had used a hundred dollar bill. Marlo did not object to this testimony, and neither the receipt nor the video was admitted into evidence. Marlo requested a jury instruction pursuant to *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964), on the grounds that the surveillance video had been misplaced and never provided to the defense. The court granted the request and instructed the jury that if it found the state had "lost, destroyed, or failed to preserve" material evidence without adequate explanation, it could draw an adverse inference against the

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[2]The detective later learned the truck was registered to a name associated with a "dummy" driver license record—one that contained no information other than the licensee's name and date of birth. According to the detective, "dummy" files are commonly used by narcotics smugglers to conceal their identities.

[3]In addition, the manager of a local Douglas motel testified Marlo had registered for a room there at 4:45 p.m. that day and had declined to list a vehicle license plate number on his registration card, instead writing "N/A walk-in."

state that "in itself may create a reasonable doubt as to the defendant's guilt."

Testimony of Agent Ruiz

¶5 Marlo first argues Ruiz's testimony about the surveillance video and statements made by the gas station clerk was hearsay and admitted in violation of the Confrontation Clause of the United States Constitution. Although we generally review a trial court's evidentiary rulings for an abuse of discretion, we review de novo challenges to admissibility based on the Confrontation Clause. *State v. Tucker*, 215 Ariz. 298, ¶¶ 46, 61, 160 P.3d 177, 192, 194 (2007).

¶6 As Marlo concedes, because he did not object to the agent's testimony at trial, he has forfeited appellate review of his claims but for fundamental, prejudicial error. *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). Fundamental error goes to the foundation of the case and takes from the defendant a right essential to his defense, such that the defendant could not possibly have received a fair trial. *Id.* The defendant bears the burden of persuasion in fundamental error review, and, to prevail, he "must establish both that fundamental error exists and that the error . . . caused him prejudice." *Id.* ¶¶ 19-20.

¶7 "The Confrontation Clause prohibits the admission of testimonial hearsay unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination." *State v. Forde*, 233 Ariz. 543, ¶ 80, 315 P.3d 1200, 1221 (2014), *citing Crawford v. Washington*, 541 U.S. 36, 51, 68 (2004) ("Testimony" means "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact"). Hearsay, in turn, is defined as "a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." Ariz. R. Evid. 801(c). A "statement," for purposes of the hearsay rule, may include nonverbal conduct, but only if the "declarant" intends the conduct as an assertion of some fact. Thus, "[c]onduct can only be deemed an assertion if there is specific evidence or circumstances indicating the actor intended the conduct to be an assertion of the

fact sought to be proved." *State v. Steinle*, 239 Ariz. 415, ¶ 22, 372 P.3d 939, 944 (2016).

¶8 We agree with the state that Ruiz's testimony about the content of the surveillance video cannot be characterized as hearsay, because Marlo's conduct on the video, as observed and reported by Ruiz, did not amount to an assertion of any fact. *See id.* Because it was not hearsay at all, it did not constitute the testimonial hearsay prohibited by the Confrontation Clause.

¶9 However, Ruiz's testimony that the gas station clerk told him Marlo had paid with a hundred dollar bill was hearsay; the clerk did not testify, and the statement was reported to establish Marlo's method of payment, the fact asserted by the clerk. It also appears to be testimonial hearsay, prohibited by the Confrontation Clause under *Crawford*. *See Crawford*, 541 U.S. at 52 (statements taken by police officer in course of interrogation are testimonial).

¶10 The state concedes "there may have been error" in admitting, through Ruiz's testimony, the gas station employee's statement about Marlo's method of payment. But it argues any error "did not rise to the level of a fundamental error." Again, we agree.

¶11 Marlo argues, in conclusory fashion, that hearsay evidence that he paid for gas with a hundred dollar bill "completely vitiates any defense of lack of knowledge regarding the load of marijuana." But, according to his defense, he did not knowingly transport the marijuana and, instead, "someone named Torres hired [him] to deliver a truck for sale to Douglas" and "offered him a hundred dollars plus expenses" for the job. As the state suggests, evidence that Marlo paid for gas with a hundred dollar bill is entirely consistent with the defense he presented to the jury. Marlo has not persuaded us this was an error of such magnitude that he could not possibly have received a fair trial, or that admission of this hearsay testimony was prejudicial. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607; *cf. State v. Bocharski*, 218 Ariz. 476, ¶ 38, 189 P.3d 403, 413 (2008) (subjecting Confrontation Clause violation to harmless error analysis); *State v. McGann*, 132 Ariz. 296, 299, 645 P.2d 811, 814 (1982) (unless "hearsay evidence is the sole proof of an

essential element of the state's case," hearsay admitted without objection becomes competent evidence for all purposes).

Venue

¶12 Marlo next maintains the state failed to establish that "the offense occurred within the jurisdiction of Cochise County," and he argues, without citation to relevant authority, that this failure "constitutes fundamental reversible error." But Marlo's argument conflates venue with jurisdiction. Under the Arizona Constitution, a criminal defendant has the right to "trial by an impartial jury of the county in which the offense is alleged to have been committed." Ariz. Const. art. II, § 24; *see also* A.R.S. § 13–109(A). Although this court has said that "proper venue is a jurisdictional requirement," *State v. Agnew*, 132 Ariz. 567, 577, 647 P.2d 1165, 1175 (App. 1982), our supreme court has clarified that "jurisdiction is the power of a court to try a case," while "venue concerns the locale where the power may be exercised," *State v. Willoughby*, 181 Ariz. 530, 543, 892 P.2d 1319, 1332 (1995).

¶13 Unlike subject matter jurisdiction, which may be raised at any time, *State v. Chacon*, 221 Ariz. 523, ¶ 5, 212 P.3d 861, 863-64 (App. 2009), "venue may be waived or changed," *Willoughby*, 181 Ariz. at 537, n.7, 892 P.2d at 1326 n.7. Moreover, venue can be proven to the trial court under the preponderance of evidence standard, by direct or circumstantial evidence. *State v. Mohr*, 150 Ariz. 564, 566-67, 724 P.2d 1233, 1235-36 (App. 1986). Where no evidence supports a contrary inference, a trial or appellate court may infer that venue has been established by circumstantial evidence. *See State v. Detrich*, 178 Ariz. 380, 384, 873 P.2d 1302, 1306 (1994).

¶14 Although there may have been no direct testimony that Marlo was stopped while transporting marijuana in Cochise County, the trial court reasonably could have found proper venue had been established. *See State v. Scott*, 105 Ariz. 109, 110-11, 460 P.2d 3, 4-5 (1969) (evidence sufficient to establish venue "if there is proof of facts from which the court can take judicial notice of venue"). Marlo asserts that "[p]arts of Highway 191 are in Cochise County, parts of

it are in other counties[, and t]here was no indication where Davis Road is." But, to the contrary, there was testimony that Marlo had been stopped at milepost 11 on Davis Road, off of Highway 191. Even more specifically, a DPS detective testified he first observed Marlo in front of him while on "Highway 191 traveling northbound out of Douglas" and explained the Davis Road turnoff is at "approximately milepost 18" on Highway 191. This clearly identified portion of Highway 191, between Douglas and milepost 19, is all within Cochise County, as the trial court implicitly found. Sufficient evidence established that venue was proper in Cochise County.

Disposition

¶15 For the foregoing reasons, we affirm Marlo's conviction and sentence.