IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JOSE PEDRO CASILLAS,
Appellant.

No. 2 CA-CR 2016-0126
Filed June 14, 2017

Appeal from the Superior Court in Pima County
No. CR20151466001
The Honorable Danelle B. Liwski, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel, Phoenix
By Amy M. Thorson, Assistant Attorney General, Tucson
Counsel for Appellee

Joel Feinman, Pima County Public Defender
By Sarah L. Mayhew, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Presiding Judge Staring and Judge Espinosa concurred.

M I L L E R, Judge:

¶1 Following a jury trial, Jose Casillas was convicted of possession of cocaine for sale and possession of drug paraphernalia. The trial court suspended the imposition of sentence and placed Casillas on concurrent, three-year terms of probation. Casillas argues the court erred in admitting a police officer's testimony that the cocaine was for sale and other evidence about uncharged acts resulted in fundamental, prejudicial error. We affirm.

¶2 We view the evidence in the light most favorable to sustaining the convictions. *See State v. Mangum*, 214 Ariz. 165, ¶ 3, 150 P.3d 252, 253 (App. 2007). After noticing the temporary license tags on the car Casillas was driving, Tucson Police Officer Tequida drove his car behind Casillas, who then sped away and passed another car, appearing to be "evading" him. Casillas stopped in front of a residence and the officer questioned him. Casillas initially gave false identification information, but then admitted his correct name and date of birth. Casillas told Tequida the car he was driving belonged to a friend of his, the person who lived at the house where they had stopped. Tequida determined the car was not registered to either Casillas or the friend. Casillas consented to a search of his person and Tequida found in his pocket seven individual baggies of cocaine weighing 7.6 grams, as well as $924 in cash. Casillas cursed when Tequida found the drugs. Tequida, who is bilingual, testified that Casillas said, in Spanish, he sold drugs to the person he claimed owned the car he was driving. Officers searched the car and found a box of empty baggies and a notebook.

¶3 Tucson Police Officer Carmona testified at trial as an expert. He opined, based on his law-enforcement experience generally and specialized experience with narcotics investigation, Casillas had possessed the cocaine for sale. Among the factors Carmona had considered in reaching that conclusion were the following: the total amount of cocaine, the number of individual baggies and the amount of cocaine in each (between .8 grams up to 1.3 grams), the fact that there were other baggies in the car, and the cash Casillas had on him, including the denominations.

¶4 Casillas testified at trial that he was a drug addict and had been using drugs since he was thirteen years old. He stated he had been paid the day he was arrested for two construction jobs and the cash he had received was in his pockets. He also testified he had purchased the seven baggies of cocaine that day for personal use. He denied selling drugs. His former girlfriend, with whom he had lived for eleven years, also testified that he was a drug addict and had a serious drug habit. She stated that she did not believe he sold drugs, but rather purchased drugs to use.

¶5 Although Casillas did not object to Carmona's testimony, he argues for the first time on appeal that this was improper expert testimony under Rule 702, Ariz. R. Evid., and its admission resulted in fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶ 22, 115 P.3d 601, 608 (2005) (defendant who raises claim for first time on appeal "bears the burden of establishing both that fundamental error occurred and that the error caused him prejudice"); *see also* Ariz. R. Evid. 103(a)(1) (party may only claim error on evidentiary ruling if party objected and ruling affects substantial right). Error is fundamental if it "goes to the foundation of his case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial." *Henderson*, 210 Ariz. 561, ¶ 24, 115 P.3d at 608.

¶6 Rule 702 "allows an expert witness to testify if, among other things, the witness is qualified and the expert's 'scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence.'" *State v. Romero*, 239 Ariz. 6, ¶ 12, 365 P.3d 358, 361 (2016), *quoting* Ariz. R. Evid. 702(a). It is well-established that

a law enforcement officer with sufficient experience may testify as an expert as to whether, in his or her opinion, drugs were possessed for sale or personal use; such testimony may assist the trier of fact in understanding the evidence or determining a fact in issue. *State v. Carreon*, 151 Ariz. 615, 617, 729 P.2d 969, 971 (App. 1986); *see State v. Keener*, 110 Ariz. 462, 466, 520 P.2d 510, 514 (1974) (court did not abuse discretion in permitting law enforcement officer to opine quantity and purity of drugs possessed by defendant "indicated that they were for sale rather than personal possession"); *see also State v. Fornof*, 218 Ariz. 74, ¶¶ 20-21, 179 P.3d 954, 959-60 (App. 2008).

¶7 Carmona testified he became a Tucson police officer in 2008, and was "trained in the recognition and identification of narcotic investigations and collection of evidence related to those types of investigation[s]." He also testified about his experience with cocaine as a patrol officer and a member of a narcotics task force, which included discussions with drug dealers and drug users, and undercover work that involved drug transactions. Defense counsel thoroughly cross-examined him in order to challenge his opinion that Casillas had possessed the cocaine for sale, eliciting testimony about drug dealers and addicts, his lack of knowledge about the behaviors of an addicted person, and other bases for his conclusions.

¶8 Casillas challenges Carmona's opinion and his qualifications. "If an expert meets the 'liberal minimum qualifications,' her level of expertise goes to credibility and weight, not admissibility" of the expert's opinion. *State v. Delgado*, 232 Ariz. 182, ¶ 12, 303 P.3d 76, 80 (App. 2013), *quoting Kannankeril v. Terminix Int'l, Inc.*, 128 F.3d 802, 809 (3d Cir. 1997); *see also State v. Davolt*, 207 Ariz. 191, ¶ 70, 84 P.3d 456, 475 (2004) ("The degree of qualification goes to the weight given the testimony, not its admissibility."). It was thus for the jury to determine how much weight to give Carmona's testimony. Indeed, the jury was so instructed, which defense counsel pointed out to the jury during closing argument. With respect to the admission of this testimony, we see no error, much less error that may be characterized as fundamental error.

¶9 Similarly, the evidence was relevant and was not, as Casillas contends, unfairly prejudicial. Nor did Carmona invade the

province of the jury by testifying on an ultimate issue. The trial court did not err, fundamentally or otherwise, by sua sponte failing to give the jury a limiting instruction.

¶10 Casillas also argues Tequida's testimony involved other-act evidence prohibited by Rule 404(b), Ariz. R. Evid., including testimony that he fled from Tequida, provided false identification information, and drove a car that was neither registered to the person he had claimed owned it nor to Casillas. He acknowledges he did not object below but argues the admission of this evidence resulted in fundamental, prejudicial error.

¶11 Rule 404(b) precludes evidence of "other crimes, wrongs, or acts" to prove a person's character in order to show the person acted in conformity with his character, *State v. Leteve*, 237 Ariz. 516, ¶ 11, 354 P.3d 393, 399 (2015), but such evidence may be admitted, "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," Ariz. R. Evid. 404(b); *State v. Burns*, 237 Ariz. 1, ¶ 52, 344 P.3d 303, 320 (2015). Intrinsic evidence, that is, evidence of acts that "are so closely related to the charged act that they cannot fairly be considered 'other' acts, but rather are part of the charged act itself," is admissible without regard to Rule 404(b). *State v. Ferrero*, 229 Ariz. 239, ¶¶ 14, 23, 274 P.3d 509, 512, 514 (2012); *see also State v. Butler*, 230 Ariz. 465, ¶ 31, 286 P.3d 1074, 1082 (App. 2012) (evidence of acts so interrelated with charged act that they are part of charged act itself not analyzed under Rule 404(b)). But evidence is intrinsic only "if it (1) directly proves the charged act, or (2) is performed contemporaneously with and directly facilitates commission of the charged act." *Ferrero*, 229 Ariz. 239, ¶ 20, 274 P.3d at 513. Although intrinsic evidence "may not be invoked merely to 'complete the story' or because evidence 'arises out of the same transaction or course of events' as the charged act," *id.*, such evidence may be admitted to assist the jury in understanding the circumstances of the charged act, such "as how and why [the defendant] was arrested." *State v. Myers*, 117 Ariz. 79, 85-86, 570 P.2d 1252, 1258-59 (1977); *see Ferrero*, 229 Ariz. 239, ¶ 23, 274 P.3d at 514 (evidence offered for proper purpose when it completes story to avoid confusing jury). The state suggests that evidence of Casillas's evasive conduct, the false information about his

identity, and the incorrect information about the car, may be viewed as intrinsic to the charged offenses. We agree with Casillas's assertion that it was not.

¶12 The state is correct, however, that the evidence was admissible for proper purposes. The evidence, particularly the evidence of the erratic driving and evasive conduct, completed the story by informing the jury as to why Tequida had stopped Casillas. Although *Ferrero* stands for the proposition that the mere fact that evidence completes the story does not automatically render that evidence intrinsic, it does not necessarily mean such evidence is inadmissible. 229 Ariz. 239, ¶ 20 & n.4, 274 P.3d at 513 & n.4; *see also Myers*, 117 Ariz. at 85-86, 570 P.2d at 1258-59. Additionally, to the extent this could have been viewed as evidence of a brief flight from a law enforcement officer, such evidence is generally relevant and admissible because it demonstrates knowledge under Rule 404(b) and a consciousness of guilt. *See State v. Weible*, 142 Ariz. 113, 116, 688 P.2d 1005, 1008 (1984); *see also State v. Speers*, 209 Ariz. 125, ¶¶ 28-30, 98 P.3d 560, 567-68 (App. 2004) (acknowledging relevance and admissibility of evidence of flight that raises obvious suspicion or announces person's guilt).

¶13 Casillas admitted at trial that he was carrying a significant amount of cocaine and his evasive conduct was consistent with that testimony. Evasive driving and possession of cocaine is separate from whether he intended to sell or to use the drug. We see no error in the court's failure, sua sponte, to preclude this testimony, much less error that could be characterized as fundamental.

¶14 Similarly, Casillas's proffer of false identification demonstrated evasion and an awareness of his own guilt. *See State v. Fulminante*, 193 Ariz. 485, ¶ 27, 975 P.2d 75, 84 (1999) (false, misleading, and inconsistent statements made by defendant to law enforcement officer show consciousness of guilt); *see also State v. Birchfield*, 1 Ariz. App. 436, 438, 404 P.2d 97, 99 (1965) (use of false name evidence of consciousness of guilt). Again, we see no error in the admission of this evidence, much less fundamental error.

¶15 We also reject his related argument that the trial court erred by failing sua sponte to give a limiting instruction on the use of any of the other-act evidence. A court's failure to sua sponte provide a limiting instruction based on Rule 404(b) is not fundamental error. *See State v. Roscoe*, 184 Ariz. 484, 491, 910 P.2d 635, 642 (1996); *State v. Williams*, 209 Ariz. 228, n.3, 99 P.3d 43, 49 n.3 (App. 2004) (no limiting instruction regarding evidence admitted under Rule 404(b) required when none requested).

¶16 Finally, Casillas also contends two irrelevant photographs were admitted, one of him at the time of his arrest and one of the car he had been driving, which was neither registered to him nor to the person he claimed was his friend. He maintains the admission of these photographs, to which he did not object, resulted in fundamental, prejudicial error. As the state points out, however, based on Tequida's testimony the jury was well aware that Casillas had been arrested. Any error was harmless.

¶17 We also agree with the state the evidence about the car, including the photographs, did not necessarily suggest Casillas had committed car theft. As the state notes, defense counsel elicited during cross-examination of Tequida his concession that it was possible the person to whom the car was registered had sold it to the friend Casillas claimed owned it. Casillas never said it was his. Again, even assuming the photographs were erroneously admitted, any error was harmless and cannot be characterized as fundamental.

¶18 We affirm the convictions and the probationary terms imposed.