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.

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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THE STATE OF ARIZONA, Appellee, v. STACEE RENE WILLIAMS, Appellant.	2 CA-CR 2008-0173 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20071838

Honorable Barbara Sattler, Judge Pro Tempore

AFFIRMED

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V Á S Q U E Z, Judge.

¶1 Appellant Stacee Williams challenges his convictions for two counts of armed robbery. He contends the trial court violated his rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution by permitting the state to introduce evidence of a tattoo noted in a record of a prior conviction without eliciting testimony from the person who had made the notation. For the reasons set forth below, we affirm.

Facts and Background

¶2 We view the facts in the light most favorable to upholding the jury's verdicts. *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). Late in the evening on May 5, 2007, James U. and Jacob G., both high school students, were walking home from a movie theater. As they crossed through an intersection, they "struck up" a conversation with two other young men. The men invited them to a nearby party and led them into an apartment complex. James and Jacob waited outside while the men retrieved something from an apartment. When the men returned, one of them told the other to go wait for his cousin and then told James and Jacob to follow him through a gate. Once they were through the gate, the man pulled out a gun and demanded, "Give me all your shit, or I am going to smoke both of you" and cocked the gun. He ordered them to empty their pockets and take off their shirts and shoes. He then released them, and they called the police from a nearby convenience store.

¶3 After police officers arrived, James gave a statement and went home. While Jacob was giving his statement to a detective, Williams walked into the store, and Jacob immediately recognized him as the robber. James was called back to the store and also

identified Williams as the robber, noting "everything [about the suspect] look[ed] the same." Williams was arrested and charged with two counts of armed robbery.[1] A jury convicted him of both charges, and the trial court sentenced him to enhanced, mitigated, consecutive prison terms of seven years. This appeal followed.

Discussion

¶4 The sole issue in this appeal is whether the trial court's admission of Williams's prior conviction record to establish that he previously had a teardrop tattoo under his eye violated his Sixth Amendment Confrontation Clause rights.[2] "We review evidentiary rulings that implicate the Confrontation Clause de novo." *State v. Bocharski*, 218 Ariz. 476, ¶ 33, 189 P.3d 403, 412 (2008).

¶5 Because Williams failed to object on this ground below, we review only for fundamental error.[3] *See State v. Cleere*, 213 Ariz. 54, ¶ 8, 138 P.3d 1181, 1184 (App. 2006).

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[1]Williams was also charged with possession of a deadly weapon by a prohibited possessor, but that charge was severed prior to trial.

[2]Williams objected extensively below on the grounds of relevance, unfair prejudice, and foundation. He has failed to raise any of these issues on appeal. We thus do not consider any ground for the record's exclusion other than the Confrontation Clause. *See State v. McCall*, 139 Ariz. 147, 163-64, 677 P.2d 920, 936-37 (1983) (failure to raise claim on appeal constitutes abandonment and waiver).

[3]Williams contends he "fully objected at trial to the confrontation clause issue" by "ma[king] a record about all of the questions he would need to ask the unknown employee," but it is clear from the record that these questions were directed at the issue of foundation, not the Confrontation Clause. *See State v. King*, 213 Ariz. 632, ¶¶ 17, 28, 146 P.3d 1274, 1280-81 (App. 2006) (analyzing application of Confrontation Clause separately from foundation). The objections were thus insufficient to preserve this argument. *See State v. Alvarez*, 213 Ariz. 467, ¶ 7, 143 P.3d 668, 670 (App. 2006) (noting objection on hearsay ground insufficient to preserve argument based on Confrontation Clause).

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.'" *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005), *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). Williams thus bears the burden of establishing error, that it was fundamental, and that it caused him prejudice. *See State v. Ruggiero*, 211 Ariz. 262, ¶ 25, 120 P.3d 690, 696 (App. 2005).

¶6 During trial, James, Jacob, and the officers all testified that Williams had a teardrop tattoo underneath his right eye on the night of the offense. Arguably, however, the tattoo was not visible at the time of trial or in his booking photograph, taken after he had been arrested. The state sought to corroborate the witnesses' testimony by introducing a redacted record from Williams's 2005 conviction listing his identifying features, including his name, birth date, height, weight, and a teardrop tattoo under his right eye. The court admitted the record but precluded any mention it pertained to a prior conviction.

¶7 On appeal, Williams argues admission of the record violated his confrontation rights because the notation about his tattoo was an "out-of-court statement[] directed towards guilt" that should have been precluded absent his ability to cross-examine the person who had prepared the record. He relies on *Crawford v. Washington*, 541 U.S. 36 (2004), in which he contends the Supreme Court "held that the introduction of out-of-court statements directed towards establishing guilt when a defendant has no opportunity to cross-examine or confront that witness violates the confrontation clause."

¶8 The Confrontation Clause guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him." U.S. Const. amend. VI. In *Crawford*, the Court considered whether the Confrontation Clause barred otherwise admissible hearsay statements that had been made by an unavailable declarant the defendant had no opportunity to cross-examine. 541 U.S. at 38. After analyzing the text and history of the Confrontation Clause, the Court concluded that it prohibited only the admission of "testimonial hearsay" and stated: "[W]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law." *Id.* at 53, 68. Thus, the Confrontation Clause only "prohibits the admission of testimonial evidence from a declarant who does not appear at trial unless the declarant is unavailable and the defendant had a prior opportunity to cross examine the declarant." *State v. King*, 213 Ariz. 632, ¶ 17, 146 P.3d 1274, 1279 (App. 2006). Therefore, contrary to Williams's argument, our focus under the Confrontation Clause is not on whether the statement at issue "is directed towards establishing guilt," but on whether the statement is "testimonial" in nature. *See Davis v. Washington*, 547 U.S. 813, 824-25 (2006).

¶9 In *Crawford*, the Court did not provide an encompassing definition of testimonial statements, but it noted that the Confrontation Clause applied to "'witnesses' against the accused–in other words, those who 'bear testimony,'" and it defined testimony as "'a solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Crawford*, 541 U.S. at 51, *quoting* 2 Noah Webster, *An American Dictionary*

of the English Language (1828). It also noted that "[m]ost of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy." *Id.* at 56.

¶10 In *King*, we applied *Crawford*'s analysis to records of prior convictions to determine whether they constituted testimonial evidence within the purview of the Confrontation Clause. 213 Ariz. 632, ¶ 17, 146 P.3d at 1279. King had been charged with, *inter alia*, aggravated driving under the influence of an intoxicant (DUI) with two or more prior DUI convictions. *Id.* ¶ 1. King filed a motion to suppress the evidence of his prior convictions, arguing, in part, that their admission violated the Confrontation Clause. *Id.* ¶¶ 2, 4. The trial court denied the motion and the jury found him guilty. *Id.* ¶ 4.

¶11 On appeal, we rejected King's argument that the records were testimonial. *Id.* ¶ 23. Looking "to the nature and content of the record and the circumstances surrounding the creation of the record as a whole," we noted that "[r]ecords of prior convictions are public records, which are created and maintained regardless of possible future criminal activity by the defendants" and that "[c]onvictions are not recorded exclusively in anticipation of future litigation for the purpose of establishing facts contained in those records." *Id.* ¶¶ 23, 24 (citations omitted). Thus, we concluded "the individuals entering the information in the records cannot be considered witnesses against the subject of the records, and their statements are not testimonial." *Id.* ¶ 24 (citation omitted). Therefore, their admission did not violate the Confrontation Clause. *Id.* ¶ 27.

¶12 In an attempt to distinguish the facts of this case from *King*, Williams argues *King*'s application is limited to the use of prior conviction records for sentence enhancement purposes. He contends the use of the record in this case "went beyond Arizona's self-authenticating business records exception . . . because it was used by the state to prove identity."[4] Contrary to Williams's assertion, however, the conviction records in *King* were used as substantive evidence to prove an element of the offense of "aggravated DUI with two or more prior DUI convictions." *Id.* ¶¶ 1, 4. The use of Williams's prior conviction record to establish his identity as the robber is factually indistinguishable. As in *King*, the record here was used to prove that Williams committed the offenses; but, because it was not created for that purpose, the record was nontestimonial in nature. *See id.* ¶¶ 23-24; *see also Crawford*, 541 U.S. at 51-52; *Davis*, 547 U.S. at 828 (emergency call seeking police assistance not testimonial although later used to prove defendant committed crime).

¶13 Williams's physical description, including his tattoo, was included in the conviction record as part of the ministerial, routine preparation of such a document. *See King*, 213 Ariz. 632, ¶ 26, 146 P.3d at 1280; *Bohsancurt v. Eisenberg*, 212 Ariz. 182, ¶ 34, 129 P.3d 471, 480 (App. 2006) (affidavits created "in the ordinary course of business" not testimonial). Thus, the person who entered the information into Williams's conviction record

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[4]Williams also suggests *Crawford* stands for the proposition that where "there is a risk that the jury will consider the [out-of-court hearsay statements] as proof of a disputed fact, . . . the evidence is prejudicial and is precluded by the Confrontation Clause." We can find no support for this proposition in *Crawford* or its progeny. In fact, in *Davis*, the Supreme Court held that statements made during an emergency telephone call were not precluded by the Confrontation Clause, despite the fact they were later used as evidence of the defendant's guilt. 547 U.S. at 818-19, 827-28.

could not be characterized as a witness against him, and the notation of the teardrop tattoo was not testimonial. *King*, 213 Ariz. 632, ¶ 24, 146 P.3d at 1280; *see Crawford*, 541 U.S. at 56 (business records by nature not testimonial). There was no error, let alone fundamental error, in the trial court's admission of the information from Willliams's prior conviction record under the Confrontation Clause.[5]

Disposition

¶14 We affirm Williams's convictions and sentences.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

_____
PETER J. ECKERSTROM, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge

[5]Because we have concluded no error occurred, we need not reach the issue of prejudice. *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607 (to obtain reversal defendant must demonstrate both fundamental error and prejudice).