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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STATE OF ARIZONA, Appellee, v. JAVIER ADAN ARMENDARIZ, Appellant.	2 CA-CR 2009-0234 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20083623

Honorable Richard Nichols, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Diane Leigh Hunt
Tucson
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
By M. Edith Cunningham
Tucson
Attorneys for Appellant

B R A M M E R, Presiding Judge.

¶1 Appellant Javier Armendariz was convicted after a jury trial of four counts of sale of a narcotic drug, two counts of sale of marijuana, one count of possession of a narcotic drug for sale, and one count of possession of marijuana. On appeal he contends certain language in the jury instruction the trial court gave on the defense of entrapment

constituted a comment on the evidence and that the instruction was erroneous and misled the jury. We affirm for the reasons stated below.

¶2 The instruction Armendariz requested, which the trial court gave, essentially mirrored A.R.S. § 13-206(B), which provides that to prove the defense of entrapment, the accused must establish the following by clear and convincing evidence:

> 1. The idea of committing the offense started with law enforcement officers or their agents rather than with the person.
>
> 2. The law enforcement officers or their agents urged and induced the person to commit the offense.
>
> 3. The person was not predisposed to commit the type of offense charged before the law enforcement officers or their agents urged and induced the person to commit the offense.

The instruction also included the following language, which the state proposed and which essentially is identical to language found in § 13-206(C):

> The defendant does not establish entrapment if he was predisposed to commit the offenses. It is not entrapment for law enforcement officers or their agents to use a ruse or to conceal their identity. The conduct of law enforcement officers and their agents may be considered in determining if the defendant has proven entrapment.

¶3 Armendariz objected to the language the state added on the ground the language was a comment on the offense, conceding the instruction was on the supreme court's "website." Defense counsel argued the language in the instruction Armendariz proposed "is just basically straight out of the statute" whereas the state's proposed language "seem[ed] to be argument" and was "not actually contained in the statue." The

trial court stated it "share[d] [Armendariz's] concerns" but that it would give the instruction nevertheless because it was clearly the one our supreme court preferred.

¶4 On appeal, Armendariz contends the added language "singled out and unduly emphasized particular parts of the evidence relevant to entrapment to the exclusion of the rest of the evidence." He adds that the offending language "repeated the requirement that the defendant must not be predisposed to commit the offense, which focused the jury's attention to the evidence on that issue instead of the ample evidence" he insists shows the police officer repeatedly contacted him and "induced him to commit the offenses." Relying on *State v. Garza*, 192 Ariz. 171, ¶ 16, 962 P.2d 898, 902-03 (1998), he contends the trial court abused its discretion by failing to exercise its discretion. He argues the court failed to recognize that even though the instruction was recommended by the supreme court on its website, the court nevertheless had the discretion to reject the additional language the state had proposed.

¶5 Armendariz did not argue below that the trial court failed to exercise its discretion. He therefore has forfeited the right to relief on this ground for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 18-22, 115 P.3d 601, 607-08 (2005). He has not established error that can be characterized as fundamental because has not persuaded this court that the trial court failed to exercise its discretion. Additionally, he did preserve the objection to the instruction on the ground that it constituted a comment on the evidence. Because we reject that argument, as discussed below, even were we to find the court did not exercise its discretion to strike

portions of the instruction to which Armendariz objected as a comment on the evidence, we necessarily conclude there was no fundamental, prejudicial error as a result.

¶6 We now turn to the argument Armendariz did assert below, which is that the state's proposed language was a comment on the evidence. We review de novo whether a jury instruction properly states the law. *State v. Orendain*, 188 Ariz. 54, 56, 932 P.2d 1325, 1327 (1997). "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Ariz. Const. art. VI, § 27. An instruction violates this prohibition if it "'express[es] an opinion as to what the evidence proves' or 'interfere[s] with the jury's independent evaluation of that evidence.'" *State v. Roque*, 213 Ariz. 193, ¶ 66, 141 P.3d 368, 388 (2006), *quoting State v. Rodriguez*, 192 Ariz. 58, ¶ 29, 961 P.2d 1006, 1011 (1998).

¶7 With respect to Armendariz's challenge to the phrase, "The defendant does not establish entrapment if he was predisposed to commit the offenses," this language is taken directly from § 13-206(C). *See id.* ("A person does not establish entrapment if the person was predisposed to commit the offense . . . ."). Moreover, it does not refer to specific evidence presented in the case and does not "express an opinion as to what the evidence proves." *State v. Barnes*, 124 Ariz. 586, 590, 606 P.2d 802, 806 (1980). As Armendariz notes, the added language regarding predisposition essentially reiterates the earlier portion of the instruction that provided as one of the elements of entrapment that the defendant was not predisposed to commit the offense. But this repetition is consistent with the statute; the additional language regarding predisposition was drawn

from subsection C of the statute which, it might be said, simply restates, in negative terms, the provisions found in subsection B.

¶8 Subsection C also provides as follows: "It is not entrapment for law enforcement officers or their agents merely to use a ruse or to conceal their identity." The jury instruction tracked this language as well, but the word "merely" was omitted. Again, that the language in the instruction, like the language in the statute, may be repetitious, does not render the instruction a comment on the evidence.

¶9 But Armendariz also argues, for the first time on appeal, that the omission of the word "merely" rendered this portion of the instruction inaccurate and misleading. Because he did not make this argument in the trial court, he waived all but fundamental, prejudicial error with respect to this argument. *See Henderson*, 210 Ariz. 561, ¶¶ 18-22, 115 P.3d at 607-08.

¶10 As Armendariz points out, § 13-206(C) provides entrapment is not established "merely" because officers use a ruse or conceal their identity. He contends omission of the term "merely" "precluded the jury from properly considering the affirmative defense of entrapment." He argues that the instruction as given "suggested that jurors could not even consider the use of a ruse or concealment in determining whether an officer engaged in entrapment."

¶11 Armendariz has not sustained his burden of persuading this court that the instruction resulted in fundamental, prejudicial error. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008). Taken as a whole, the instruction was such that reasonable jurors would understand they could consider the conduct of law

enforcement officers in determining whether Armendariz had been entrapped, but, if officers had used a ruse or concealed their identity, that fact, without more, did not establish entrapment. We agree with the state that any other interpretation of the instruction would be nonsensical. Construed as Armendariz proposes, the instruction essentially would swallow the defense, because when officers are involved in drug transactions they necessarily hide their identity. As the state points out, the interpretation of the instruction Armendariz posits would mean a defendant could not assert the defense unless he had sold drugs to an officer who had disclosed his or her true identity.

¶12 We affirm the convictions and sentences imposed.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

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

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge