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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee/Respondent, v. XRISTOS A. MAGOULAS, Appellant/Petitioner.	2 CA-CR 2009-0273 2 CA-CR 2010-0180-PR (Consolidated) DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL AND PETITION FOR REVIEW
FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20083096

Honorable John S. Leonardo, Judge

AFFIRMED IN PART; VACATED AND REMANDED IN PART
REVIEW GRANTED; RELIEF DENIED

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V Á S Q U E Z, Presiding Judge.

¶1 After a jury trial, appellant Xristos Magoulas was convicted of one count of possession of marijuana for sale and one count of transportation of marijuana for sale. The trial court sentenced him to concurrent, mitigated terms of imprisonment totaling 3.5 years, with consecutive community supervision. On appeal, Magoulas contends the court erred in 1) permitting the state to introduce evidence of a prior conviction for impeachment purposes; 2) failing to make a proper record that he had waived his right to testify; 3) refusing to dismiss two jurors; 4) denying his request to appoint an expert witness; 5) admitting drug courier profile evidence; and 6) giving improper jury instructions. He also alleges that numerous instances of prosecutorial misconduct denied him a fair trial and require reversal of his convictions.

¶2 In his consolidated petition for review, Magoulas challenges the trial court's summary dismissal of his claims of ineffective assistance of counsel in his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. For the reasons stated below, we conclude that one of Magoulas's convictions and sentences must be vacated and we remand this matter to the trial court for the purpose of making that determination. And, although we grant the petition for review, we deny relief.

Factual and Procedural Background

¶3 We view the facts in the light most favorable to sustaining the convictions. *State v. Cropper*, 205 Ariz. 181, ¶ 2, 68 P.3d 407, 408 (2003). In July 2008, Magoulas was returning to the United States from Mexico when he was stopped at the port of entry

in Lukeville, Arizona, by United States Customs Service officers. He was driving a rented truck and towing a boat that he owned. The primary inspections officer referred Magoulas to a secondary officer who scanned the boat using an x-ray machine. The x-ray scan showed a dense image inside the boat's hull, which later was determined to be 409 bundles of marijuana weighing approximately 413 pounds. Magoulas was charged with one count of possession of marijuana for sale and one count of transportation of marijuana for sale. The jury found Magoulas guilty of both counts and the trial court sentenced him as noted above.[1]

¶4 After the trial court denied Magoulas's motion for a new trial, he filed a timely notice of appeal. He subsequently filed a petition for post-conviction relief in the trial court pursuant to Rule 32, Ariz. R. Crim. P., which the court summarily denied. Magoulas filed with this court a petition for review of that ruling, and we granted his motion to consolidate his appeal with the petition for review.

Discussion

A. Issues on Appeal

1. Denial of Motion to Preclude Prior Conviction

¶5 Magoulas contends the trial court erred in denying his motion to preclude evidence of a prior conviction for attempted theft. He claims the conviction was inadmissible for impeachment purposes because it was for an open-ended offense which ultimately was designated a misdemeanor after he had successfully completed probation,

[1]In Magoulas's first trial, the jury was unable to reach a unanimous verdict and the court declared a mistrial.

and because it did not involve a crime of moral turpitude. In denying Magoulas's motion to preclude, the court found the prior conviction admissible because it was for "a class six felony offense punishable by imprisonment in excess of one year at the time of his conviction."[2]

¶6 "We review the admission of prior convictions under Rule 609 for abuse of discretion." *State v. Beasley*, 205 Ariz. 334, ¶ 19, 70 P.3d 463, 467 (App. 2003). However, "long-established and controlling Arizona law . . . requires a defendant to testify at trial before he can challenge an adverse pretrial ruling . . . admitting prior convictions for impeachment." *State v. Smyers*, 207 Ariz. 314, ¶ 5, 86 P.3d 370, 372 (2004). *See State v. Lee*, 189 Ariz. 608, 617, 944 P.2d 1222, 1231 (1997); *State v. White*, 160 Ariz. 24, 30, 770 P.2d 328, 334 (1989). And although we recognize that an adverse pretrial ruling on the admissibility of prior convictions for impeachment may substantially impact a defendant's decision to testify in the first instance, we are bound by the opinions of our supreme court. *State v. Sullivan*, 205 Ariz. 285, ¶ 15, 69 P.3d

[2]Rule 609(a), Ariz. R. Evid. states:

> For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record, if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect, and if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted or (2) involved dishonesty or false statement, regardless of the punishment.

1006, 1009 (App. 2003). Magoulas has therefore waived this issue on appeal because he did not testify at trial.

¶7 In his reply brief, he nonetheless maintains that "once an Appellate issue is before the [c]ourt, [it] must consider it under the fundamental error analysis." Magoulas cites no authority to support this argument. And, although "we will not ignore [fundamental error] when we find it," *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007), we need not address an issue that has been waived entirely, as is the case here. *Lee*, 189 Ariz. at 617, 944 P.2d at 1231. Thus, we decline to address this argument further.

2. Impeachment

¶8 Magoulas next contends the trial court erred in refusing to admit transcripts from his first trial of another expert's testimony for the purpose of impeaching Immigrations and Customs Enforcement special agent Juan Bortfeld's testimony. "We review the trial court's ruling on the admissibility of . . . evidence for abuse of discretion." *State v. Aguilar*, 209 Ariz. 40, ¶ 29, 97 P.3d 865, 874 (2004). During cross-examination of Bortfeld, defense counsel sought to use transcripts of the testimony of ICE special agent Helen Hritz, the state's expert witness in the first trial, to impeach Bortfeld's testimony. The trial court denied the request, stating that Bortfeld had not been present at the first trial. Defense counsel responded that she would subpoena agent Hritz to testify the following day but apparently failed to do so.

¶9 On appeal, Magoulas maintains he should have been permitted to impeach Bortfeld's testimony with the prior inconsistent statements made by Hritz in the first trial.

Magoulas does not dispute that the statements were hearsay. *See* 801(c) Ariz. R. Evid. (defining hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted"). Although Hritz's testimony may have differed from Bortfeld's, Magoulas cites no authority, and we find none, suggesting her testimony was admissible under Rule 801(d)(1)(A). By its plain language, that rule applies only to statements made by the same declarant whose in-court statements are being impeached and thus has no application here. *See* Ariz. R. Evid. 801(d)(1)(A) (prior statement by declarant not hearsay if "inconsistent with declarant's testimony").

¶10 Magoulas nevertheless contends Hritz's statements "should not simply be denied because they were hearsay, but under the Arizona Rules of Evidence, regarding expert witnesses, they were proper questions to be asked of Agent Bortfeld." Because Magoulas does not develop this argument or support it with any authority, we do not consider it further. *See* Ariz. R. Crim. P. 31.13(c) (setting forth required contents of appellate briefs, including argument and citation to authorities); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (claim waived on appeal by insufficient argument). Magoulas has provided no reason for us to conclude the trial court abused its discretion in refusing to admit the transcripts for impeachment purposes.

3. Double Jeopardy Violation

¶11 Magoulas's convictions for transportation of marijuana for sale and possession of marijuana for sale arise from a single quantity of marijuana. Because they are based on the same transaction, his convictions violate the Double Jeopardy Clause

and constitute fundamental, prejudicial error. *See State v. Brown*, 217 Ariz. 617, ¶¶ 6-11, 177 P.3d 878, 881-82 (App. 2008) (separate convictions for sale and transfer, based on same transaction, constituted double jeopardy); *see also State v. Ortega*, 220 Ariz. 320, ¶ 7, 206 P.3d 769, 772 (App. 2008) (double jeopardy violation constitutes fundamental error). Although Magoulas does not raise this argument on appeal, we do not ignore fundamental error when we find it in the record. *See Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650-51. We therefore would generally vacate his conviction and sentence for possession of marijuana for sale, as it is the lesser offense. *See State v. Jones*, 185 Ariz. 403, 407-08, 916 P.2d 1119, 1123-24 (App. 1995) (when only one of two convictions may stand, "[g]enerally, the 'lesser' conviction is vacated"). However, in our discretion, we remand this matter to the trial court for a determination under the circumstances of this case as to which conviction and sentence should be vacated.

4. Waived Issues

¶12 The remaining issues Magoulas raises on appeal were raised for the first time either in the motion for new trial or his opening brief. We typically review those issues only for fundamental, prejudicial error. *See State v. Pandeli*, 215 Ariz. 514, ¶ 7, 161 P.3d 557, 564 (2007) (fundamental error review appropriate when issues raised for first time in new trial motion); *see also State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). However, Magoulas does not argue on appeal that the alleged errors were fundamental; thus, he "cannot sustain his burden in a fundamental error analysis." *State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 18, 185 P.3d 135, 140 (App. 2008) (where appellant fails to argue that error fundamental or prejudicial, issue waived on

appeal). And, as to those issues, we independently find no "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." *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). Magoulas has neither alleged nor established fundamental, prejudicial error.

B. Issues on Review

¶13 In addition to the issues raised on appeal, Magoulas contends the trial court erred in summarily dismissing his petition for post-conviction relief because trial counsel rendered ineffective assistance throughout trial. He raises fourteen separate instances of alleged ineffective assistance of counsel, most of which are directly related to the errors he asserts on appeal.

¶14 We review a trial court's summary dismissal of a petition for post-conviction relief for an abuse of discretion. *State v. Rosales*, 205 Ariz. 86, ¶ 1, 66 P.3d 1263, 1264 (App. 2004). "The trial court need only conduct an evidentiary hearing where the defendant has raised a colorable claim for relief." *State v. Boldrey*, 176 Ariz. 378, 380, 861 P.2d 663, 665 (App. 1993). "A colorable claim is 'one that, if the allegations are true, might have changed the outcome.' To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant." *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006), *quoting State*

v. Runningeagle, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993) (internal citation omitted); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶15 The trial court considered and addressed each of the issues Magoulas raises in his petition for review in a thorough and well-reasoned ruling. It separately identified each issue, applied the appropriate standards of review and relevant legal principles, and correctly resolved the issues "in a fashion that will allow any court in the future to understand [its] resolution." *State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). No further purpose would be served by rehashing the court's ruling here, *see id.*, and we therefore adopt the court's reasoning in its entirety.

¶16 For the first time on review, Magoulas also alleges counsel was ineffective in failing to impeach Officer Ivan Gonzalez who testified that he had been told by another officer that Magoulas appeared nervous during the border stop. Magoulas asserts that during a pretrial interview the other officer stated Magoulas had not appeared nervous. However, we do not consider issues raised for the first time in a petition for review. Rule 32.9(c)(1)(ii) limits our review to "[t]he issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review." *See also State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (appellate court will not consider on review any issue on which trial court had not first had opportunity to rule). We thus do not consider this issue further.

Disposition

¶17 For the reasons stated above, we remand this case to the trial court for the purpose of determining which of Magoulas's convictions and sentences must be vacated

under the circumstances of this case. And, although we grant review of his petition for review, we deny relief.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge