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OCT 27 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| THE STATE OF ARIZONA,<br><br>Appellee,<br><br>v.<br><br>ERIC THORIN PEELER,<br><br>Appellant. | 2 CA-CR 2009-0338<br>DEPARTMENT A<br><br>MEMORANDUM DECISION<br>Not for Publication<br>Rule 111, Rules of<br>the Supreme Court |

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200900003

Honorable Donna M. Beumler, Judge Pro Tempore

AFFIRMED

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Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Alan A. Amann — Tucson
Attorneys for Appellee

John William Lovell — Tucson
Attorney for Appellant

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H O W A R D, Chief Judge.

**¶1** After a jury trial, appellant Eric Peeler was convicted of one count of possession of a dangerous drug for sale, having a weight of less than nine grams, and one

count of possession of a deadly weapon by a prohibited possessor. On appeal, Peeler argues the trial court erred in finding he had opened the door to the admission of certain evidence and in denying his motion for a mistrial. For the following reasons, we affirm.

## Factual and Procedural Background

**¶2** "We view the facts in the light most favorable to sustaining the convictions." *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). An officer stopped the vehicle Peeler was driving for speeding and for having expired registration tags. Inside the vehicle was a scanner tuned to listen to police radio traffic. Another officer found a concealed handgun and arrested Peeler for carrying a concealed weapon without a permit. During a search of Peeler incident to his arrest, officers found a small bag of methamphetamine and a pipe. A search of the vehicle revealed marijuana, a small, digital scale with crystal residue, a silver loading spoon, numerous small baggies, and a case containing a mixture of methamphetamine and a substance called "MSM." Also found was a modified shotgun in the trunk of the car.

**¶3** The next day officers executed a search warrant on Peeler's residence, which had several padlocks over the door and a surveillance camera overlooking the front of the trailer. They found a book of police codes with the code for narcotics highlighted, another electronic scale and additional small baggies, but no additional firearms. Peeler moved to suppress evidence of the shotgun, and the trial court granted his motion. After his conviction, the court sentenced Peeler to consecutive terms totaling twenty years imprisonment. This appeal followed.

**Admission of Evidence**

**¶4** Peeler first argues the trial court erred by finding he had "opened the door" to admission of evidence of the shotgun found in the trunk. He further contends that the evidence concerning the shotgun should have been suppressed as an other bad act under Rule 404(b), Ariz. R. Evid. We review the trial court's rulings on the admission of other act evidence under Rule 404(b) for an abuse of discretion. *State v. Dickens*, 187 Ariz. 1, 18, 926 P.2d 468, 485 (1996).

**¶5** Peeler moved to suppress the evidence concerning the shotgun because it was evidence of an other act under Rule 404(b), which prohibits the admission of such evidence to show a defendant acted in conformity with a character trait. The trial court originally found that evidence of the shotgun was "tangentially related to the for[-]sale element," but that this probative value was outweighed by the danger of undue prejudice. Later, while cross-examining the detective about the execution of the search warrant, Peeler's counsel asked specifically whether "a lot of times, drug dealers have guns in their houses" and then, whether any guns or ammunition were found at Peeler's residence. The state argued this opened the door to evidence of the shotgun. And, the court found the "defense ha[d] opened the door to the admissibility of the shotgun."

**¶6** If a party opens the door to a line of inquiry, the evidence may be admissible, regardless of whether it would have been inadmissible otherwise. *See State v. Fish*, 222 Ariz. 109, n.11, 213 P.3d 258, 273 n.11 (App. 2009) (state opened door to rebuttal with prior act evidence). "We recognize that where one party injects improper or

irrelevant evidence or argument, the 'door is open,' and the other party may have a right to retaliate by responding with comments or evidence on the same subject." *Pool v. Superior Court*, 139 Ariz. 98, 103, 677 P.2d 261, 266 (1984). '"[I]n essence the open door . . . doctrine means that a party cannot complain about a result he caused."' *State v. Kemp*, 185 Ariz. 52, 60-61, 912 P.2d 1281, 1289-90 (1996), *quoting State v. Lindsey*, 149 Ariz. 472, 477, 720 P.2d 73, 78 (1986). "The rule [of opening the door] is most often applied to situations where evidence adduced or comments made by one party make otherwise irrelevant evidence highly relevant or require some response or rebuttal." *Pool*, 139 Ariz. at 103, 677 P.2d at 266.

**¶7** When defense counsel began to imply that Peeler was not intending to sell the methamphetamine because no additional firearms were found at his residence, he suggested to the jury that no additional firearms whatsoever were found and that Peeler had no intent to sell the methamphetamine for this reason. The trial court could have decided that the otherwise "tangentially" relevant evidence now became highly relevant and required the state be given some opportunity to respond. *See id.*; *Kemp*, 185 Ariz. at 61, 912 P.2d at 1290 ("By asserting the non-existence of evidence . . . defense counsel cannot now claim error occurred by meeting the assertion with contrary proof."). Consequently, even if the shotgun would have been otherwise inadmissible under Rule 404(b), the court did not abuse its discretion by finding defense counsel had opened the door to evidence of the shotgun.

**¶8** Peeler also argues evidence that he possessed the shotgun was not clear and convincing as required by *State v. Terrazas*, 189 Ariz. 580, 944 P.2d 1194 (1997), for the admission of other acts. But he never objected on this basis to the trial court. To preserve an argument for review, the defendant must make sufficient argument to allow trial court to rule on the issue.[1] *State v. Fulminante*, 193 Ariz. 485, ¶ 64, 975 P.2d 75, 93 (1999) ("objection is sufficiently made if it provides the judge with an opportunity to provide a remedy"). "And an objection on one ground does not preserve the issue [for appeal] on another ground." *State v. Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d 682, 683 (App. 2008). If a defendant does not object in the trial court, he has forfeited the right to seek appellate relief for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005) (failure to object to alleged error in trial court results in forfeiture of review for all but fundamental error).

**¶9** Peeler did not object to the admission of evidence of the shotgun on the ground of insufficient evidence. Consequently, he did not make an adequate argument to allow the trial court to rule on the issue. *See Fulminante*, 193 Ariz. 485, ¶ 64, 975 P.2d at 93. Objecting that evidence of the shotgun was more prejudicial than probative and was

[1]To the extent Peeler attempts to argue the trial court must evaluate the sufficiency of Rule 404(b) evidence *sua sponte*, his one-sentence argument and mention of *State v. Vigil*, 195 Ariz. 189, 986 P.2d 222 (App. 1999), in which the court does not discuss the fundamental error standard, is insufficient. Ariz. R. Crim. P. 31.13(c)(1)(vi) (proper argument "shall contain . . . the reasons therefor, with citations to the authorities, statutes and parts of the record relied on"). The issue, therefore, is waived. *State v. Sanchez*, 200 Ariz. 163, ¶ 8, 24 P.3d 610, 613 (App. 2001) (claim waived because defendant failed to develop argument in brief).

offered for an improper purpose does not alert the court to a challenge as to the quantum of evidence. *See Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d at 683 (objection on one ground insufficient to preserve on another). Under *Henderson*, Peeler's failure to object to error forfeits review absent fundamental error. *See* 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607.

**¶10** Furthermore, because Peeler does not argue on appeal that the error is fundamental, and because we find no error that can be so characterized, the argument is waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (fundamental error argument waived on appeal); *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error if it finds it).

**Motion for Mistrial**

**¶11** Peeler next argues the trial court erred in denying his motion for mistrial, which was based upon the admission of a witness's testimony that Peeler previously had sold methamphetamine. "'A declaration of a mistrial is the most dramatic remedy for trial error and should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted.'" *State v. Herrera*, 203 Ariz. 131, ¶ 4, 51 P.3d 353, 356 (App. 2002), *quoting State v. Adamson*, 136 Ariz. 250, 262, 665 P.2d 972, 984 (1983). In deciding whether to grant a motion for mistrial on the basis of a witness's testimony, a trial court must examine "whether the testimony called to the jurors' attention matters they would not be justified in considering in reaching their verdict and[, if so,] . . . the probability under the circumstances of the case that the testimony

influenced the jurors." *State v. Lamar*, 205 Ariz. 431, ¶ 40, 72 P.3d 831, 839 (2003). An appellate court gives great deference to a trial court's decision because it "is in the best position to determine whether the [testimony] will actually affect the outcome of the trial." *State v. Jones*, 197 Ariz. 290, ¶ 32, 4 P.3d 345, 359 (2000). Therefore, a denial of a motion for mistrial will not be disturbed absent an abuse of discretion. *State v. Dann*, 205 Ariz. 557, ¶ 43, 74 P.3d 231, 244 (2003).

**¶12** During trial, a state witness, C., testified that Peeler had begun selling methamphetamine in late September or early October, several months before his arrest. C. also stated she had introduced Peeler to the person from whom he purchased the methamphetamine and initially had given him the money to purchase it. Peeler's attorney objected citing Rule 404(b) and then moved for a mistrial. The trial court expressed concerns about admitting the evidence but ruled it was "relevant to prove motive, the opportunity and intent, and perhaps preparation and plan, which are exceptions under [Rule] 404[(b)]." The court instructed the jury to limit the use of the testimony to the purposes listed in Rule 404(b).

**¶13** Under Rule 404(b), "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." It is inadmissible for the purpose of "'show[ing] that the defendant is a bad person or has a propensity for committing crimes.'" *State v. Hargrave*, 225 Ariz. 1, ¶ 10, 234 P.3d 569, 576 (2010), *quoting State v. McCall*, 139 Ariz. 147, 152, 677 P.2d 920, 925 (1983). However, the rule provides the evidence may be offered "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). The trial court must determine that the evidence is offered for a proper purpose, is relevant to that purpose, its probative value outweighs the danger of unfair prejudice, and must give an appropriate limiting instruction if requested. *Hargrave*, 225 Ariz. 1, ¶ 10, 234 P.3d at 576.

**¶14** We thus first evaluate whether the trial court abused its discretion in admitting the evidence of prior sales of methamphetamine for a proper purpose. *See State v. Coghill*, 216 Ariz. 578, ¶ 13, 169 P.3d 942, 946 (App. 2007) (other act evidence reviewed under abuse of discretion standard). Peeler was charged with the intent to sell methamphetamine only on December 30, not in late September or early October. Each sale of drugs is an individual instance of criminal activity. *See State v. Ramirez Enriquez*, 153 Ariz. 431, 432, 737 P.2d 407, 408 (App. 1987) (evidence of other drug sales inadmissible as "proof of other criminal episodes"). And evidence of any plan or preparation to sell drugs must be particular to that individual sale, rather than proving that the defendant is a drug dealer. *See id.* at 432-33, 737 P.2d at 408-09. No evidence shows that Peeler used the money C. gave him in September or October to buy the methamphetamine found on him in late December. Nor did Peeler's intent in late December depend on his actions from several months earlier. Instead, evidence of Peeler's earlier sales merely showed his propensity for committing criminal acts. We disagree with the state's unsupported argument that the earlier sales were "intertwined with" an intent to sell in December. *See Coghill*, 216 Ariz. 578, ¶ 26, 169 P.2d at 949

("other acts are intrinsic evidence when they are[, inter alia,] . . . so intertwined with the charged acts that they cannot be extracted"). Therefore, the court erred in admitting improper Rule 404(b) evidence, "call[ing] the jurors' attention to matters that they would not be justified in considering in reaching their verdict." *Lamar*, 205 Ariz. 431, ¶ 40, 72 P.3d at 839.

**¶15** However, a mistrial should not be granted unless a probability exists, under the circumstances of the case, that the testimony influenced the jurors. *Id.* At the time of his arrest, Peeler possessed methamphetamine and a cutting agent. C. properly testified that she had given Peeler the small baggies and silver spoon that officers also found at that time, and that he had used these items to weigh bags of methamphetamine. Officers also found two digital scales, a scanner listening to the police frequency and a book of police codes with the code for drug narcotics highlighted. Additionally, the jury was instructed not to use the other act evidence as evidence of Peeler's character or to establish that he had acted in conformity with a particular character trait. We presume the jury follows its instructions. *State v. Morris*, 215 Ariz. 324, ¶ 55, 160 P.3d 203, 216 (2007). Under these circumstances, we conclude beyond a reasonable doubt that C.'s improperly admitted statements did not affect the verdict and, thus, will not disturb the conviction. *See State v. Buchholz*, 139 Ariz. 303, 306, 678 P.2d 488, 491 (App. 1983) (upholding denial of mistrial because improper admission of evidence was harmless error); *State v. Green*, 200 Ariz. 496, ¶ 21, 29 P.3d 271, 276 (2001) (court will not

reverse conviction on appeal "if an error is clearly harmless"), *quoting State v. Doerr*, 193 Ariz. 56, ¶ 33, 969 P.2d 1168, 1176 (1998).

**Conclusion**

**¶16** Based on the foregoing, we affirm Peeler's convictions and sentences.

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

CONCURRING:

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

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