

**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.

FILED BY CLERK

JUL 23 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Appellee,)	2 CA-CR 2012-0401
)	DEPARTMENT A
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
JAMES DANIEL FLORES,)	Rule 111, Rules of
)	the Supreme Court
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR201100618

Honorable Wallace R. Hoggatt, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Joseph T. Maziarz and Kathryn A. Damstra

Tucson
Attorneys for Appellee

Joel A. Larson, Cochise County Legal Defender

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V Á S Q U E Z, Presiding Judge.

¶1 Following a jury trial, James Flores was convicted of possession of methamphetamine and possession of drug paraphernalia. The trial court suspended the imposition of sentence and placed him on concurrent terms of probation, the longest of which was four years. On appeal, Flores argues the court erred by allowing the state to elicit improper drug-profile testimony and expert opinion on the issue of guilt or innocence, and by failing sua sponte to declare a mistrial or provide curative jury instructions based on that evidence. For the reasons that follow, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding Flores’s convictions. *See State v. Abdi*, 226 Ariz. 361, ¶ 2, 248 P.3d 209, 211 (App. 2011). On February 18, 2011, Corporal Michael Mitchell of the Sierra Vista Police Department stopped a vehicle being driven by Flores at a “very high rate of speed in [a] residential area” where the posted speed limit was twenty-five miles per hour. During the encounter, Flores appeared “extremely nervous,” his hands shook “tremendously,” and his chest “heav[ed] up and down.” Upon verifying the vehicle was not registered to Flores, Mitchell asked for the name of the vehicle’s owner. Flores gave the name of a friend, “Manny,” which differed from the name on the vehicle’s registration. When Mitchell repeated the question, Flores responded that the vehicle belonged to a friend, but “he didn’t know his name.” Mitchell noticed that Flores “kept looking over at [his] passenger . . . for maybe a little help from him to figure out who the owner was.”

¶3 After observing Flores’s “hands go toward his stomach, up underneath his shirt,” Mitchell asked him to “step out of the vehicle for [officer] safety and to investigate

further.” Flores complied and also consented to a search of his person. Mitchell found a “small plastic baggie” containing a “crystal substance” he believed to be methamphetamine in Flores’s front pants’ pocket.¹ Mitchell placed Flores under arrest.

¶4 Flores was charged by indictment with one count each of possession of methamphetamine and possession of drug paraphernalia. The jury found him guilty as charged. He was placed on probation as described above, and this appeal followed.² We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

Improper Testimony

¶5 Flores contends the trial court erred by admitting “impermissible [drug] profile testimony” and “expert opinion evidence on the issue of [his] guilt or innocence.” He acknowledges that because he did not contemporaneously object to this testimony at trial, we review solely for 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). Fundamental error goes to the foundation of the case, takes away a right essential to the defense, and is of such magnitude that the defendant could not possibly have received a fair trial. *Id.* ¶ 19. Flores has the burden to show both that the error was fundamental and that it caused him prejudice. *See id.* ¶¶ 19-20.

¹Subsequent testing confirmed the substance was methamphetamine.

²Shortly after Flores filed his notice of appeal, the state petitioned to revoke his probation. Although the relevant documents are not part of our record on appeal, Flores apparently admitted to violating his probation and received a presumptive prison term.

A. Profile Evidence

¶6 During direct examination, Mitchell gave a detailed description of his law enforcement experience, which included extensive training and experience as a narcotics agent and drug interdiction officer. He then testified about his encounter with Flores, describing Flores as “extremely nervous” to the extent that “[h]is hands were shaking very tremendously, and his chest was heaving up and down as [Mitchell] was speaking to him.” He stated that when he asked Flores who owned the vehicle, Flores was unable to give a name that matched the registered owner and kept looking at his passenger “for maybe a little help from him to figure out who the owner was.” Mitchell went on to explain:

I come in contact with the general motoring public, which I refer to as the innocent motoring public, maybe 95[percent], maybe more than that, . . . of the time. Over my law enforcement career and experience, you get to know what the usual reactions and behaviors of people who are not involved in criminal activity as you conduct a traffic stop.

One of the things for me that raises [my] suspicions is most everybody, when they’re driving a car, they’re going to know who owns the car, whether it be you or your friend. And usually those responses are fairly immediate. There appeared to be some nervousness involved in that. But that’s something that is going to come automatically. If I’m driving a vehicle, more than likely I’m going to know who that vehicle belongs to, whether it’s mine or somebody else’s. Also I’m not going to be moving around so much, herky jerky. I’m just—I can’t sit still, I’m moving around. He kept moving his hands. Again, I noticed that they were shaking so tremendously and his chest was heaving. At one point I asked him if he was sick, and he told me no.

¶7 Flores maintains that Mitchell’s testimony was the sort of profile evidence condemned by *State v. Lee*, 191 Ariz. 542, 959 P.2d 799 (1998). In *Lee*, our supreme court described a drug courier profile “as an ‘informal compilation of characteristics’ or an ‘abstract of characteristics’ typically displayed by persons trafficking in illegal drugs.” 191 Ariz. 542, ¶ 10, 959 P.2d at 801 (internal citations omitted). The defendants in *Lee* were charged with both possession and transportation of marijuana for sale. *Id.* ¶ 3. To prove they knowingly possessed marijuana in a suitcase, the state introduced an officer’s testimony comparing the defendants’ specific behaviors—carrying a hard-sided suitcase, taking the last flight to a city known as a destination for illegal drugs, and arriving extremely late to board the plane—with a known drug-courier profile. *Id.* ¶ 13. By eliciting testimony about patterns of “‘drug courier activities,’” the state intended to show the defendants’ “‘actions [were] consistent with drug couriers and drug activities.’” *Id.* ¶ 14. Our supreme court said the evidence should have been precluded because it “‘create[d] too high a risk’” that “‘because someone shares characteristics—many of them innocent and commonplace—with a certain type of offender, that individual must also’” be guilty. *Id.* ¶¶ 12, 14 (internal citation omitted).

¶8 Here, although Mitchell gave a detailed description of his law enforcement experience in drug interdiction, he did not testify about the behaviors of known drug offenders or “suggest[] that because [Flores’s] conduct [wa]s similar to that of other proven violators, he too must be guilty.” *Id.* ¶ 19. On the contrary, Mitchell compared Flores to the “innocent motoring public” in describing his behavior and the unusual and extreme nature of his nervousness. We therefore disagree that Mitchell’s testimony was

the type of profile evidence condemned in *Lee*. And even assuming for the sake of argument that the testimony was profile evidence, the court in *Lee* also noted that there are exceptions to the general rule prohibiting drug courier profile evidence, such as providing background for a police stop and search. 191 Ariz. 542, ¶ 11, 959 P.2d at 802, citing *United States v. Gomez-Norena*, 908 F.2d 497, 501 (9th Cir. 1990) (profile evidence admissible to “provide the jury with a full and accurate portrayal of the events as they unfolded”). Mitchell’s testimony was given squarely in that context. Accordingly, Flores has not met his burden of establishing error on this basis, much less fundamental, prejudicial error. See *Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607.

B. Opinion Testimony

¶9 Flores also challenges Mitchell’s testimony as improper expert opinion evidence on the ultimate issue of guilt or innocence. He maintains “the testimony suggested that the innocent motoring public was in one category, while [he] was in a different category.”

¶10 Both lay and expert witnesses may give opinion testimony, “even though the opinion ‘embraces an ultimate issue’ of fact,” if it is “helpful to the determination of a fact in issue.” *State v. King*, 180 Ariz. 268, 280, 883 P.2d 1024, 1036 (1994), quoting *Fuenning v. Superior Court*, 139 Ariz. 590, 605, 680 P.2d 121, 136 (1983); see also *State v. Carreon*, 151 Ariz. 615, 617, 729 P.2d 969, 971 (App. 1986); Ariz. R. Evid. 701, 702. But, opinions of witnesses, including experts, regarding a defendant’s guilt or innocence are inadmissible. See Ariz. R. Evid. 701, 702, 704(b); *State v. Lindsey*, 149 Ariz. 472,

475, 720 P.2d 73, 76 (1986); *State v. Williams*, 133 Ariz. 220, 227-28, 650 P.2d 1202, 1209-10 (1982).

¶11 Viewed in the broadest sense, to the extent Mitchell gave an opinion, it was that Flores appeared unusually nervous compared to other motorists based on Mitchell's perception of Flores's behavior during the traffic stop. "Evidence of a person's nervousness has generally been held to be admissible to show that the person is aware that he is engaging in unlawful conduct." *Beijer v. Adams*, 196 Ariz. 79, ¶ 22, 993 P.2d 1043, 1047 (App. 1999). And in *Beijer*, this court said that an officer's "refer[ence] to a number of factors that led to [his] conclusion that the [d]efendant was nervous beyond the norm . . . was properly admitted." 196 Ariz. 79, ¶ 22, 993 P.2d at 1047. But Flores points out that we also said the "[a]dmissibility of such evidence does not, of course, extend to testimony concerning the officer's conclusions about nervousness based on his drug interdiction training." *Id.* And he notes that here, Mitchell "drew the conclusion that . . . Flores'[s] nervousness, based on his extensive training and experience as a 'street cop,' set him apart from 'ninety-five percent of the innocent motoring public.'" First, the language in *Beijer* quoted above was in the context of impermissible drug courier profile evidence, and we have already concluded that Mitchell's testimony did not constitute profile evidence. Second, we disagree that Mitchell's testimony improperly "quantified" the probabilities of Flores's guilt by comparing him to ninety-five percent of the "innocent motoring public." See *Lindsey*, 149 Ariz. at 475, 720 P.2d at 76. It was said in the context of describing Flores's unusually nervous behavior and did not "provid[e an] opinion[] of [his] guilt or innocence or tell[] the jury how it should decide the case."

King, 180 Ariz. at 280, 883 P.2d at 1036. And, in any event, Flores has not shown “prejudice sufficient to constitute fundamental error.” *State v. Velazquez*, 216 Ariz. 300, ¶ 50, 166 P.3d 91, 102 (2007).

¶12 In short, there was substantial evidence of Flores’s guilt. He was driving at a high rate of speed, far in excess of the posted speed limit, resulting in a traffic stop. He was unusually nervous during that encounter and could not identify the registered owner of the vehicle. During a consensual search of his person, Mitchell found a usable quantity of methamphetamine in his pants’ pocket. Flores neither challenges the validity of the traffic stop nor the propriety of the search. His only defense was that he did not knowingly possess the methamphetamine because he had forgotten the drugs were in his pocket at the time of his arrest. We therefore find beyond a reasonable doubt that a reasonable jury would not have reached a different result had Mitchell’s purported improper testimony been precluded. *See State v. Thomas*, 130 Ariz. 432, 436, 636 P.2d 1214, 1218 (1981).

Denial of Mistrial and Failure to Give Instructions

¶13 Flores next argues the trial court “fundamentally erred in not declaring a mistrial, instructing the jury to disregard [Mitchell’s] statement, or giving a limiting instruction when [Flores] failed to make these requests.”³ Generally, we review a trial

³Flores also claims the trial court committed fundamental error by not “sua sponte declaring a mistrial.” “A defendant generally waives his objection to testimony if he fails to . . . request a mistrial.” *State v. Ellison*, 213 Ariz. 116, ¶ 61, 140 P.3d 899, 916 (2006). And, “[a]bsent fundamental error, a defendant cannot complain if the court fails . . . to sua sponte order a mistrial.” *Id.* (internal citations omitted). Because we conclude Flores has not established error of a fundamental, prejudicial nature with respect to Mitchell’s

court's failure to grant a mistrial for an abuse of discretion. *State v. Moody*, 208 Ariz. 424, ¶ 124, 94 P.3d 1119, 1151 (2004). But “when a defendant fails to contemporaneously object to testimony and later moves for mistrial based on that testimony, we review only for fundamental error.” *State v. Cruz*, 218 Ariz. 149, ¶ 101, 181 P.3d 196, 213 (2008). And, because we have determined that Mitchell’s testimony did not rise to the level of fundamental, prejudicial error, we also conclude “[t]he mistrial motion was properly denied; no fundamental error occurred.” *Id.* ¶ 102.

¶14 We decline to review the trial court’s alleged failure to give the jury instructions for fundamental error, because any error was invited by Flores. The purpose of the invited error doctrine is to prevent a party from “inject[ing] error in the record and then profit[ing] from it on appeal.”” *State v. Logan*, 200 Ariz. 564, ¶ 11, 30 P.3d 631, 633 (2001), quoting *State v. Tassler*, 159 Ariz. 183, 185, 765 P.2d 1007, 1009 (App. 1988) (alterations in *Logan*). And if an error is invited, we will not reverse, even for an allegedly fundamental error. See *State v. Musgrove*, 223 Ariz. 164, ¶ 8, 221 P.3d 43, 46 (App. 2009).

¶15 Here, during argument on the motion for a mistrial, the trial court offered to consider a curative instruction and gave Flores until the following day to submit one. The next day, the court stated that it had received an email from defense counsel indicating “that the defense will not be submitting an instruction.” The court then asked if this was still the case, and Flores responded that it was. Because Flores invited the

testimony, we need not further address his claim regarding the court’s failure to declare a mistrial sua sponte.

error for which he now complains, “we will not find reversible error.” *Logan*, 200 Ariz. 564, ¶ 9, 30 P.3d at 632-33.

Disposition

¶16 For the forgoing reasons, we affirm.

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

CONCURRING:

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

/s/ Michael Miller
MICHAEL MILLER, Judge