DIVISION ONE
FILED: 07/24/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	1 CA-CR 11-0718
	)	DEPARTMENT C
v.	)	**MEMORANDUM DECISION**
RAYMOND AYALA, JR., Appellant.	)	(Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Yuma County

Cause No. S1400CR201000389

The Honorable Andrew W. Gould, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Joseph T. Maziarz, Section Chief Counsel
Criminal Appeals/Capital Litigation Section
and Matthew H. Binford, Assistant Attorney General
Attorneys for Appellee

Paul J. Mattern — Phoenix
Attorney for Appellant

N O R R I S, Judge

¶1 Raymond Ayala, Jr. timely appeals his conviction and sentence for transportation of marijuana for sale, a class 2

felony. He argues the superior court improperly sentenced him to the presumptive term for a class 2 felony, because the jury failed to determine the weight of the marijuana he had transported for sale. Thus, he argues "the most serious crime [he] could be sentenced for was . . . a class three felony." As explained below, we disagree and affirm Ayala's conviction and sentence for a class 2 felony.

¶2 Ayala did not object to the jury instructions or forms of verdict at trial, and we therefore review for fundamental, prejudicial error. *State v. Henderson*, 210 Ariz. 561, 567-68, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005); *State v. Smith*, 228 Ariz. 126, 129, ¶ 10, 263 P.3d 675, 678 (App. 2011).

¶3 Under Arizona Revised Statutes subsections 13-3405(A)(4) and (B)(10)-(11) (2010), transporting marijuana weighing less than two pounds for sale is a class 3 felony, while transporting marijuana weighing two or more pounds for sale is a class 2 felony. Here, the grand jury's indictment charged Ayala with "knowingly transport[ing] marijuana for sale, having a weight of two pounds or more, a class two felony." Although the court read the indictment to the jury pool during voir dire, it did not instruct the jury the State was required to prove (and it was required to find) Ayala had knowingly transported two pounds or more of marijuana for sale. The verdict form used by the jury failed to specify the weight of

the marijuana and merely found Ayala guilty of "Transportation of Marijuana for Sale."

¶4 As both parties acknowledge, although not essential to guilt or innocence, the marijuana's weight determined the classification of the offense and the applicable sentencing range, and was "an essential element on which [Ayala had] the right to be tried by a jury." *State v. Chabolla-Hinojosa*, 192 Ariz. 360, 363, ¶ 11, 965 P.2d 94, 97 (App. 1998) (citing *State v. Virgo*, 190 Ariz. 349, 352-53, 947 P.2d 923, 926 (App. 1997)). Even assuming the jury's failure to find the weight of the marijuana constituted fundamental error, *but see State v. Fullem*, 185 Ariz. 134, 138-39, 912 P.2d 1363, 1367-68 (App. 1995) (citations omitted) (failure to instruct on an essential element not fundamental error when there is no issue as to that element), Ayala has failed to demonstrate how this error prejudiced him.

¶5 First, the indictment put Ayala on notice he was being charged with transportation for sale of two pounds or more of marijuana, and if convicted of that offense would be sentenced for a class 2 felony. Second, the arresting officer testified the marijuana seized from the car Ayala was driving weighed 26.9 pounds and Ayala was the sole occupant. Neither party introduced any evidence suggesting the marijuana weighed any other amount and the jury observed the marijuana as one of the

State's exhibits. And third, the only defense Ayala presented was that "he didn't know there was any marijuana in that vehicle." Unlike *Virgo*, 190 Ariz. at 351, 947 P.2d at 925, this is not a case in which we are "unable to ascertain" how much marijuana the jury determined Ayala possessed. Thus, Ayala has not shown how the jury's failure to find the marijuana's weight prejudiced him.

¶6 For the foregoing reasons, we affirm Ayala's conviction and sentence.

/s/
PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

/s/
DONN KESSLER, Judge

/s/
SAMUEL A. THUMMA, Judge