DIVISION ONE
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PHILIP G. URRY, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 09-0185
	)	
Appellee,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	
JOHN ALLEN ONTJES,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-169570-001 SE

The Honorable Teresa A. Sanders, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Katia Mehu, Assistant Attorney General
Attorneys for Appellee

Ballecer & Segal — Phoenix
By Natalee E. Segal
And
Law Offices of Neal W. Bassett
By Neal W. Bassett
Attorneys for Appellant

B A R K E R, Judge

¶1 Defendant appeals and argues (1) the trial court failed to offset his restitution, (2) the trial court erroneously ordered "$5,000" in oral recitation of his sentence, and (3) the jury poll violated the criminal rules. For the following reasons, we affirm.

Facts and Procedural Background

¶2 In two separate transactions occurring on two separate occasions, November 15, 2006 and December 6, 2006, defendant sold a Mesa Police Department undercover narcotics detective one quarter ounce of crystal methamphetamine for $250.[1] Mesa police arrested defendant on December 8, 2006. At the time of his arrest, police found a baggie of crystal meth and a glass smoking pipe on defendant's person and additional crystal meth in defendant's wallet located inside the vehicle defendant was driving. Defendant admitted using crystal meth for about two years and also admitted that he had started selling it about six months prior to his arrest. During a subsequent search of defendant's residence, police found several weapons, including a "Glock brand pistol" that had been reported stolen by its owner, as well as several "micro baggies" typically used by dealers to package methamphetamine.

[1] All of the facts are viewed in the light most favorable to upholding the jury's verdicts with all reasonable inferences resolved against defendant. *State v. Vandever*, 211 Ariz. 206, 207 n.2, ¶ 1, 119 P.3d 473, 474 n.2 (App. 2005).

¶3 The State charged defendant with two counts of sale/transportation of dangerous drugs, each a class 2 felony (Counts 1 and 2); one count of possession of dangerous drugs (methamphetamine) for sale, a class 2 felony (Count 3); misconduct involving weapons, a class 4 felony (Count 4); one count of theft, a class 6 felony (Count 5); and one count of possession of drug paraphernalia, a class 6 felony (Count 6). On November 25, 2008, the jury convicted defendant of counts 1, 2, 3, and 6, but acquitted him of counts 4 and 5. At a presentencing hearing, defendant admitted three historical prior felony convictions for aggravated DUI.

¶4 On February 26, 2009, the trial court sentenced defendant to concurrent mitigated sentences of 14 years in prison for each of the sale/transportation convictions and the possession for sale conviction, and a presumptive sentence of 3.75 years in prison on the possession of drug paraphernalia conviction. The court also ordered defendant to pay $500 in restitution to the Mesa Police Department (the "Department").

¶5 Defendant timely appealed, and argues (1) that the trial court erred in not granting him an "offset" for the value of the vehicles that were seized towards the restitution he was ordered to pay, (2) that the wrong restitution amount is noted in the sentencing transcript, and (3) that the trial court committed fundamental error when it incorrectly polled the

jurors regarding their guilty verdicts. This court has jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010) and 13-4033(A) (2010). For reasons set forth below, we affirm.

Discussion

1. Restitution Order Offset

¶6 As part of his sentence, defendant was ordered to pay $500 to the Department,[2] as requested, in restitution for the money the undercover officer used to make the two drug buys. The record establishes that two of defendant's vehicles were impounded by the Department. On appeal, defendant argues for the first time the trial court should also have ordered the amount of restitution he owes reduced by the value of the two vehicles the Department impounded and that the court's failure to do so is fundamental error that violates the strictures against "double punishment."

[2] The State maintains that the City of Mesa is not an appropriate "victim" under A.R.S. § 13-603(C) (Supp. 2005), which requires a trial court to order restitution to the "person" who is the victim of a crime. However, defendant does not make this argument, therefore we need not address it. Furthermore, as our court previously determined, A.R.S. § 13-105(29) (2001) also defines "person" for purposes of this title as "a government" and "a governmental authority." *State v. Guilliams*, 208 Ariz. 48, 52, ¶ 12, 90 P.3d 785, 789 (App. 2004). Because we conclude that the trial court permissibly treated the Mesa Police Department as a victim, we do not address the State's arguments regarding whether the restitution ordered should have been allocated pursuant to A.R.S. § 13-804 (2001).

¶7 Defendant relies on *U.S. v. Ruff*, 420 F.3d 772 (8th Cir. 2005), and *Town of Gilbert Prosecutor's Office v. Downie ex. rel. County of Maricopa*, 218 Ariz. 466, 189 P.3d 393 (2008), in support of his arguments that he is entitled to an offset for the value of the vehicles. Neither of these cases supports defendant's arguments.

¶8 Defendant acknowledges he failed to raise this issue before the trial court. We therefore only review for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567-68, ¶¶ 19-20, 22, 115 P.3d 601, 607-08 (2005). However, the imposition of an illegal sentence constitutes fundamental error. *State v. Thues*, 203 Ariz. 339, 340, ¶ 4, 54 P.3d 368, 369 (App. 2002). Thus if the trial court erroneously failed to *sua sponte* provide an offset, we must vacate defendant's sentence and remand this matter to the trial court for resentencing. *Id.* Before we engage in fundamental error review, we must first determine if the trial court committed some error. *State v. Lavers*, 168 Ariz. 376, 385, 814 P.2d 333, 342 (1991). In this case the trial court committed no error, let alone fundamental error, in ordering the restitution in this case.

¶9 As a preliminary matter, we note that restitution is not punishment exacted by the State, but that its purpose is solely to make the victim whole. *State v. Zaputil*, 220 Ariz. 425, 428, ¶ 11, 207 P.3d 678, 681 (App. 2008). A civil

forfeiture proceeding serves a similar non-punitive goal of ensuing that a defendant does not profit from illegal acts and therefore does not implicate double jeopardy considerations. *State ex rel. Goddard v. Gravano*, 210 Ariz. 101, 105, ¶ 14, 108 P.3d 251, 255 (App. 2005). Therefore, given the differing public policy goals of restitution or forfeiture, the imposition of both, or either, does not subject a defendant to multiple punishments.

¶10 While the record indicates that defendant's vehicles were "impounded" or "seized" by the Department, there is no indication that they were subject to forfeiture proceedings in this case, and defendant did not agree to their forfeiture as part of a plea agreement as the defendant in *Ruff* did. 420 F.3d at 773. Thus, unlike *Ruff* there is simply no evidence in the record at sentencing that forfeiture of the vehicles was contemplated or would occur, and none has been proffered by defendant on appeal. In fact, there is no indication as to the current status of the vehicles. The trial court therefore committed no error when it did not *sua sponte* order an offset at sentencing on the purely hypothetical basis that forfeiture might occur at some future date.

¶11 Nor does *Downie* provide support for defendant's position. In *Downie*, the victim homeowners received the *lawful* benefit of remodeling services from the defendant, a contractor

who was prosecuted for contracting without a license. 218 Ariz. at 467, ¶¶ 2-3, 189 P.3d at 394. Under those circumstances, our supreme court held that it was error for the trial court to order the defendant to remit, as restitution, the entire amount he had been paid by the victims without first subtracting from that amount the value of any work that the defendant had actually performed and that conferred a valid benefit to the homeowners. *Id.* at 472, ¶¶ 26-27, 189 P.3d at 399. To do otherwise, our supreme court noted, would result in a "windfall" for a homeowner who had otherwise received flawless work from an unlicensed contractor. *Id.* at 471-72, ¶ 25, 189 P.3d at 398-99.

¶12 Defendant argues the holding in *Downie* requires that the trial court should have reduced the amount of restitution he owed by the value of his impounded vehicles. However, if we take defendant's argument to its logical conclusion defendant would owe no restitution because the value of the two ounces of crystal methamphetamine received by the Department was ostensibly worth the $500 he received from them.

¶13 Here, defendant performed no lawful services for the Department and conferred no valid lawful benefit upon it when he sold them an illegal substance. Even if assuming *arguendo* the vehicles are eventually forfeited to the benefit of the Mesa Police Department pursuant to A.R.S. § 13-4315 (2001), any funds generated would only be compensating the Department, and thus,

the public, for the hours and manpower already expended in preventing defendant from profiting from his illegal actions as a drug dealer. Therefore the holding in *Downie* is inapposite to the facts of this case.

¶14 Here, the Department expended $500 of it's allocated funds to conduct the undercover purchases from defendant. The testimony at trial established that, even though the serial numbers of the bills were photocopied, the Department here was unable, or did not attempt, to recover the funds after they were given to defendant, who could presumably have spent them for legitimate purchases in the interim. The Department requested restitution of the $500 dollars it had given defendant, and the trial court ordered that amount. The amount of restitution ordered is supported by the record and therefore does not constitute an illegal sentence. The trial court committed no error, let alone fundamental error, in ordering the requested restitution without also ordering an offset.

2. Restitution Amount Ordered

¶15 The record establishes that the amount of the Department's monies expended on the drug buys in this case was $500, and the presentence report lists that amount as the total sum requested in restitution by the Department. However, the transcript of the sentencing hearing reports the amount of restitution the trial court ordered as "$5,000." Defendant and

the State agree that the amount requested by the Department was "$500," and the trial court's signed minute entry clearly lists the amount of restitution imposed as "$500.00."

¶16 The transcript of the sentencing hearing was not typed in the courtroom, and it is unclear whether the discrepancy in the amount of restitution listed is due to (1) the trial court misspoke, (2) the court reporter mistranslated, or (3) a simple typographical error. However, the record in this case is clear that the total amount of restitution at issue and imposed was $500, which comports with the trial court's signed minute entry. We therefore need not remand for resentencing to clarify or correct the record regarding restitution, but simply affirm the amount defendant was ordered to pay as $500. *State v. Bowles*, 173 Ariz. 214, 216, 841 P.2d 209, 211 (App. 1992).

3. Error in Polling Jury

¶17 The jury convicted defendant of four of the six offenses with which he was charged and acquitted him of the remaining two. The trial court *sua sponte* asked the court clerk to "poll the jury with regard to the four guilty verdicts," also stating: "You don't have to do it separately. Just as to all counts." The court clerk then asked Juror Number One, "As to the guilty verdict on Count one; the guilty verdict on Count two; the guilty verdict on Count three; and the guilty verdict on Count six, is this [your] true verdict?" To which Juror

Number One replied, "Yes." Thereafter, the clerk asked each individual juror either "As to the guilty verdicts, [are] these your true verdicts?" or, more simply, "Are these your true verdicts?" Each juror responded, "Yes."

¶18 Defendant argues for the first time on appeal that the trial court erred by grouping the offenses together when polling the jurors and not polling each separate juror individually on each individual count. Defendant has forfeited his right to relief on this issue unless he can prove both that fundamental error occurred and that it caused him prejudice. *Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607. Fundamental error is error that goes to the foundation of the case, error that takes from a defendant a right essential to his defense, and error of such magnitude that a defendant could not have received a fair trial. *Id*. at ¶ 19. The trial court committed no error, let alone fundamental error, in polling the jurors as it did.

¶19 Prior to deliberation, the jurors were instructed by the trial court that the State had to prove each element of each charge beyond a reasonable doubt; that each count was a "separate and distinct offense" and the jurors were to decide each count separately uninfluenced by their decision on any other count; and that, to return a verdict, all jurors had to agree on what that verdict was. Jurors are presumed to follow the trial court's instructions, *State v. LeBlanc*, 186 Ariz. 437,

439, 924 P.2d 441, 443 (1996), and nothing in the record persuades us that they did not do so in this case.

¶20 Arizona Rule of Criminal Procedure 23.4 provides that a jury may be polled, at the request of the parties or on the courts own initiative, and that the court may direct the jurors to retire for further deliberations or discharge them if their responses do not support the verdicts. It does not require that each individual juror be polled as to the verdict on each individual offense *ad seriatum*. Thus, as long as the record is clear, as it was here, that the guilty verdicts reflected each juror's individual decision on the four offenses with which defendant was charged, we see no error in the mere fact that the trial court grouped the counts together.

¶21 In support of his arguments, defendant cites *State v. Diaz*, 221 Ariz. 209, 211 P.3d 1193 (App. 2009), which defendant maintains found that fundamental error occurred when the trial record established that "all the jurors had not been polled." Defendant's reliance on *Diaz* is misplaced for two reasons. First, in this case, the record indicates that all of the jurors *were* polled by the trial court. Second, and more importantly, the finding of fundamental error in *Diaz* was not based on the *manner* in which the jurors were polled but focused instead on whether the proper *number* of jurors were empanelled and deliberated. *Id.* at 214, ¶ 15, 211 P.3d at 1198; *vacated by*

State v. Diaz, 223 Ariz. 358, 361-62, ¶¶ 14-17, 224 P.3d 174, 177-78 (2010). Therefore *Diaz* is not dispositive to our considerations.

¶22 Defendant fails to establish that the trial court committed any error, let alone fundamental error, in its polling of the jurors in this case. *See Lavers*, 168 Ariz. at 385, 814 P.2d at 342.

Conclusion

¶23 For the foregoing reasons, we affirm defendant's convictions and sentences.

/s/
_____
DANIEL A. BARKER, Judge

CONCURRING:

/s/
_____
PATRICIA A. OROZCO, Presiding Judge

/s/
_____
LAWRENCE F. WINTHROP, Judge