

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



DIVISION ONE
FILED: 06/12/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 11-0515
)
Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
EVERARDO ALCARAZ CONTRERAS,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-131921-001

The Honorable Susanna C. Pineda, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Joseph T. Maziarz, Assistant Attorney General
Linley Wilson, Assistant Attorney General
Attorneys for Appellee

The Gillespie Law Firm, PC Phoenix
By Craig C. Gillespie
And Carolyn J. Macias
Dave Roscoe
Attorneys for Appellant

G O U L D, Judge

¶1 Everardo Alcaraz Contreras appeals his convictions of possession of dangerous drugs for sale, transportation of dangerous drugs for sale, and misconduct involving weapons. For the following reasons, we affirm.

Factual and Procedural Background

¶2 Contreras was arrested after a police officer discovered 9.6 grams of methamphetamine on his person during a traffic stop. The methamphetamine was distributed among seven baggies, each baggie weighing within a few hundredths of a gram of the others. The vehicle Contreras was driving contained \$9,142 in cash in the center console, \$93 on top of a dog bed on the back seat, \$160 in \$20 denominations behind the sun visor on the driver's side, and three cell phones. Police officers also found three guns containing live ammunition; all three were capable of being picked up and fired.

¶3 Contreras was charged with three felonies: possession of dangerous drugs for sale, transportation of dangerous drugs for sale, and misconduct involving weapons. Contreras was present for the first day of trial, but when he failed to appear for the second day, he was tried in absentia for the remainder of the trial.

¶4 Contreras' counsel filed a motion in limine to preclude the State's expert from referring to the term "threshold amount" during his testimony. After hearing argument on this motion, the court denied it.

¶5 At trial, the State's expert, Detective Moskop, testified that he took many factors into consideration when determining whether Contreras possessed methamphetamine for sale. He explained that he considered "the totality of the circumstances," including "the way that the drugs are packaged," "the quantities that they're packaged in," "where the items are located," whether on the person or in the vehicle, "the presence of additional packaging," the "presence of weapons," the number of different phones being used, the presence and placement of multiple handguns in the vehicle, the amount, denominations, and placement of cash throughout the vehicle.

¶6 Detective Moskop was asked whether there was "any significance to 9.6 grams of methamphetamines." He replied that "the legal threshold is nine grams, so 9.6 grams is obviously over the legal threshold, which was one of the parts of - of my report that I drafted for this case." He then explained that he "took everything into consideration" when drafting his opinion, including the following:

the amount of methamphetamines, the way it was broken down, the packaging, the style a typical user uses, the amount heavy users versus light users use, the cell phones, the guns, the various different amounts of large amounts of cash throughout the car, the relevance of the car itself, and the lack of any paraphernalia to actually use the methamphetamines itself.

¶7 At the end of Detective Moskop's testimony, the court asked the jurors whether they had any questions for him. One juror passed a note that asked, "[W]hat does legal threshold of 9 grams mean? Is that considered sale instead of possession?" Without repeating the question to the other jurors, the court held a bench conference outside the hearing of the jury. At the bench conference, the court explained that it was "not going to respond to that question" and that the jury "[would] have a legal instruction on what that means in the jury instructions."

¶8 Trial continued without any further comment on the juror's question; the court had previously cautioned the jury in its preliminary instructions that "[t]he rules of evidence or other rules of law may prevent some [of the jurors'] questions from being asked" and that "[w]hen we do not ask a question, it is no reflection on the person submitting it" and that the jurors "should attach no significance to the failure to ask a question." The court also instructed the jurors that "[i]f a

particular question is not asked," they should "not guess why or what the answer might have been."

¶9 After closing arguments, the jury was instructed on the elements of the charges, including the definition of "sale."¹ The court did not explain or define what the term "legal threshold" meant during these instructions, although it did remind the jury that if the jury had a question during deliberations[,]" the jury should "utilize the jury question form" that would be provided. No further questions were asked by the jury. Without objection, both sides made their closing arguments. Contreras was ultimately convicted of all three felonies; he timely appeals.

Discussion

¶10 We "'will not reverse the [trial] court's rulings on issues of the relevance and admissibility of evidence absent a clear abuse of its considerable discretion.'" *State v. Davis*, 205 Ariz. 174, 178, ¶ 23, 68 P.3d 127, 131 (App. 2002) (quoting *State v. Alatorre*, 191 Ariz. 208, 211, 953 P.2d 1261, 1264 (App. 1998) (alteration in original)). An abuse of discretion occurs when the court exercises its discretion in a manner that is "'manifestly unreasonable, or exercised on untenable grounds, or

¹ "[S]ale" was defined for the jury as "an exchange for anything of value or advantage, present or prospective."

for untenable reasons.'" *State v. George*, 206 Ariz. 436, 443, ¶ 15, 79 P.3d 1050, 1057 (App. 2003) (quoting *State v. Dunlap*, 187 Ariz. 441, 458, 930 P.2d 518, 535 (App. 1996)). The trial court has considerable discretion in determining whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice. *State v. Gilfillan*, 196 Ariz. 396, 404-05, ¶ 29, 998 P.2d 1069, 1077-78 (App. 2000).

I. Relevance

¶11 The trial court erred in denying Contreras' motion in limine. Detective Moskop's testimony concerning the "threshold amount" was not factually relevant in this case. "Threshold amount" is statutorily defined to mean "nine grams of methamphetamine, including methamphetamine in liquid suspension." Ariz. Rev. Stat. ("A.R.S.") section 13-3401(36)(e) (2010). However, the State was not required to prove that Contreras possessed an amount of methamphetamine above the threshold amount of nine grams; this was not an element of any of the charged offenses, and it was not relevant to proving possession for sale rather than use. The fact that the drugs were over the statutory threshold might be viewed as predictive of possession for sale in the sense that the more drugs possessed, the greater the likelihood that they are possessed for sale. However, the danger of confusion potentially created

by the implication that "threshold amount" has a legal consequence substantially outweighs its potential relevance.

¶12 The "threshold amount" was also not relevant for sentencing purposes. Under A.R.S. § 13-3407(D) (2010), "if the aggregate amount of dangerous drugs involved in one offense or all of the offenses that are consolidated for trial equals or exceeds the statutory threshold amount, a person who is convicted" of the offense "is not eligible for suspension of sentence, probation, pardon or release from confinement on any basis until the person has served the sentence imposed by the court" However, this distinction became irrelevant when the legislature made any possession of methamphetamine subject to a minimum sentence of 5 years, a presumptive sentence of 10 years, and a maximum sentence of 15 years. A.R.S. § 13-709.03(A) (2010).² Even relevant evidence may be excluded "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Ariz. R. Evid. 403.³ Here, the probative value of this testimony was, at best,

² This section was later moved to A.R.S. § 13-3407(E) (West 2012).

³ We cite to the current version of the rule as no revisions material to this decision have been made.

minimal. However, the danger of unfair prejudice, confusion of the issues, and misleading the jury was high. The term "threshold amount" suggests or implies a legal consequence or significance to the term that does not exist in the context of methamphetamine cases. Accordingly, the minimal probative value of the term was outweighed by its potential to confuse or mislead the jury.

¶13 Because evidence regarding "threshold amount" violated Rule 403 and, as a result, was erroneously admitted, we next evaluate whether this error was harmless. *State v. Fischer*, 219 Ariz. 408, 418, ¶ 36, 199 P.3d 663, 673 (App. 2008) (explaining that harmless error review is used when a party objects to the admission of evidence at trial). An error is harmless "if the state, 'in light of all the evidence,' can establish beyond a reasonable doubt that the error did not contribute to or affect the verdict." *State v. Valverde*, 220 Ariz. 582, 585, ¶ 11, 208 P.3d 233, 236 (2009) (quoting *State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993)).

¶14 The evidence at trial overwhelmingly showed Contreras was guilty of possessing and transporting methamphetamine for sale. The 9.6 grams of methamphetamine was packaged in seven small plastic baggies, with each baggie being approximately the same size and containing equal weights of the drug "to within a

few hundred[th]s of a gram." Each baggie contained approximately 1.4 grams. The State's expert testified that when the weight of the baggie is included, 9.6 grams distributed among seven baggies was close to seven "teeners," which the expert explained was the street term for one-sixteenth of an ounce, one of the units typically used by drug dealers to sell methamphetamine. The "teeners" are typically sold for \$100 or \$120, according to Detective Moskop. See *State v. Arce*, 107 Ariz. 156, 161-62, 483 P.2d 1395, 1400-01 (1971) (explaining that the "for sale" element may be inferred by circumstantial evidence such as the amount of drugs present, their location and packaging (e.g., being packaged in eleven separate containers)).

¶15 The State's expert also testified that the three cell phones found in the car with Contreras were typical of drug dealers; as the State's expert explained, having three phones allows drug dealers to keep their business contacts separate from their personal contacts, and their suppliers/higher-ups separate from both. The three loaded guns containing live ammunition found in the car is also typical of drug dealers, because they enable such individuals to protect themselves from other drug dealers, law enforcement, and "drug users trying to rip them off," according to the State's expert.

¶16 Moreover, the large quantity of cash hidden in various places throughout the car is also consistent with the behavior of dealers who need to keep the money for their personal use, the money from their drug sales, and the money they plan to use to buy additional drugs from their suppliers separate, according to the State's expert. The vehicle Contreras was driving contained \$9,142 in cash in the center console, \$93 on top of a dog bed on the back seat, and \$160 in \$20 denominations behind the sun visor on the driver's side. The lack of drug paraphernalia in the vehicle also points towards possession for sale rather than possession for personal use.

¶17 Under these circumstances, we conclude that the State established beyond a reasonable doubt that the relatively brief reference to "threshold amount" "did not contribute to or affect the verdict" and that any error in its admission was harmless. See *Valverde*, 220 Ariz. at 582, ¶ 11, 208 P.3d at 236. The State presented overwhelming evidence of possession for sale; the testimony regarding the threshold amount was extremely brief - it was apparently so insignificant, the State did not even mention the term in its closing argument. See *State v. Sonowicz*, 229 Ariz. 90, 98-99, ¶ 28, 270 P.3d 917, 925-26 (App. 2012) (holding that admission of the medical examiner's testimony regarding defendant's guilt for a homicide that

"occupied only a brief portion of the trial" was harmless error because evidence of defendant's guilt was "overwhelming").

¶18 Contreras asserts that the juror's question, "what does legal threshold of 9 grams mean? Is that considered sale instead of possession," shows that the trial court's error did, in fact, affect the verdict. We disagree. The subject question reflects the momentary confusion of one juror regarding the meaning of the term, "threshold amount." However, in light of all the incriminating evidence in this case, the juror's brief expression of confusion does not, *ipso facto*, signify that the juror possessed a reasonable doubt. To the contrary, the overwhelming evidence of Contreras' guilt inexorably leads us to the conclusion that any error was harmless.

II. The Juror's Unanswered Question

¶19 Contreras also argues that the trial court erred by failing to respond to the juror's question, "what does legal threshold of 9 grams mean? Is that considered sale instead of possession?" None of the other jurors heard this question; the court stated during the bench conference that she was "not going to respond to that question" but that the jury would "get an instruction at the end of the case on what threshold is." However, at the end of the case, no such instruction was given.

¶20 While the better practice would have been to instruct the jury that “threshold amount” had no bearing on whether the methamphetamine was possessed for sale, because Contreras failed to object to the instructions and/or request inclusion of any curative instruction, we review this omission for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶¶ 18-19, 115 P.3d 601, 607 (2005); Ariz. R. Crim. P. 21.3(c) (“No party may assign as error on appeal the court’s giving or failing to give any instruction or portion thereof or to the submission or the failure to submit a form of verdict unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which the party objects and the grounds of his or her objection.”). Fundamental error is “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 defendant could not possibly have received a fair trial.” *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607.

¶21 We are not persuaded that any fundamental error occurred in this case. “In general, the decision as to whether and how to respond to a question from the jury is the province of the trial court.” *Harrington v. Beauchamp Enters.*, 158 Ariz. 118, 121, 761 P.2d 1022, 1025 (1988). The court has a duty to respond to the jury’s questions when they demonstrate clear

confusion on the jury's behalf. *Id.* Here, a question asked "by a single juror during the course of trial" is "substantially less indicative of jury confusion than a question asked by the jury panel during deliberations." *Warner v. Sw. Desert Images*, 218 Ariz. 121, 135, ¶ 44, 180 P.3d 986, 1000 (App. 2008). Because the court did not repeat the question, there is no evidence that the other jurors ever knew the contents of the question. We assume that the jury followed the instructions they were given. *Perkins v. Komarnyckyj*, 172 Ariz. 115, 118-19, 834 P.2d 1260, 1263-64 (1992) (noting that jurors are presumed to know and follow jury instructions absent any proof to the contrary). That the jury did not ask additional questions supports the inference that it was not confused and that it properly followed the instructions given.

¶22 Moreover, the verdict form instructed jurors not to answer a question about the weight of methamphetamine (over or under 9 grams) unless the jury already agreed that the drugs were possessed for sale. The order of the questions reinforced the concept that the weight of the drugs was secondary to (and not determinative of) whether the drugs were possessed for sale.

¶23 Under these circumstances, there was no error in letting the question go unanswered, let alone fundamental error. See *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607.

III. Expert Testimony

¶24 Contreras also argues that the term “threshold amount” was improper expert testimony because an expert’s testimony on issues of law is generally inadmissible. However, whether the amount was over or under the threshold was not an ultimate issue of law in the case. Contreras also argues that the expert’s testimony was not helpful to the trier of fact because it did not bear upon any of the material elements of the charges before the jury. We agree it was error for the expert to testify about the threshold amount, but for the reasons discussed above, we find that any such error was harmless. *Supra*, ¶¶ 14-18.

Conclusion

¶25 For the foregoing reasons, we affirm.

/s/

ANDREW W. GOULD, Judge

CONCURRING:

/s/

JOHN C. GEMMILL, Presiding Judge

/s/

PETER B. SWANN, Judge