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: 06/05/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 11-0668
	)	
Appellee,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
WENDY ANN COPP,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	
	)	

Appeal from the Superior Court in Yuma County

Cause No. S1400CR201001034

The Honorable Maria Elena Cruz, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

Sharmila Roy — Laveen
Attorney for Appellant

S W A N N, Judge

¶1 Wendy Ann Copp ("Defendant") timely appeals from her convictions for possession of dangerous drugs and possession of drug paraphernalia. Pursuant to *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), defense counsel advises us that a thorough search of the record has revealed no arguable question of law and requests that we review the record for fundamental error. *See State v. Richardson*, 175 Ariz. 336, 339, 857 P.2d 388, 391 (App. 1993). Defendant was given an opportunity to file a supplemental brief *in propria persona* on or before March 5, 2012. She has not done so.

¶2 Finding no fundamental error after a thorough review of the record, we affirm.

FACTS AND PROCEDURAL HISTORY[1]

¶3 In Yuma on the night of August 2, 2010, Defendant was driving her Saab north from the Mexican border. A passenger, Juan Preciado, sat with her in the front. The Saab was traveling 66 miles per hour in a zone marked for 50 miles per hour. When Officer Angulo, a sheriff's deputy, saw the speeding Saab, he pulled it over. During the stop, Defendant said she

[1] We view the facts in the light most favorable to sustaining Defendant's convictions. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

had purchased the Saab recently and didn't have insurance for it. Angulo cited her for driving without proof of insurance.

¶4 After issuing Defendant the citation, Angulo said: "You're free to go. Hey, can I ask you one quick question, though?" Defendant replied, "Sure," and Angulo asked her, "Are you still slamming?" When Defendant said, "No," Angulo asked, "How do you even know what that means?" (At trial, Angulo explained that "slamming" is slang for taking methamphetamine intravenously.) Defendant said that she knew the term's meaning because of her brother, but that she herself wasn't "slamming."

¶5 Angulo spoke with Preciado. When asked how he knew Defendant, Preciado said that Defendant had given him a ride. Angulo asked Preciado for permission to search him; Preciado granted it; and Angulo performed the search. Angulo then asked Defendant if he could search her car, and she told him to "go ahead."

¶6 When Angulo looked into the Saab from the passenger-side doorway, he saw in the center console, on top of the emergency brake, a multi-colored balloon the size of a "small potato." Angulo picked it up; it felt, he testified at trial, "crunchy, flaky." Defendant said she had never seen it, and Preciado said that it didn't belong to him. Opening the balloon, Angulo found "a white crystalline substance consistent with methamphetamine."

¶7 Angulo also found a cell phone on the driver's seat. The phone contained several text messages. One text, from someone named "Penny," read: "hey wendy how are u? long time since i talked to u. anyways if anythings is going on hit me up my roommates in need of 15[.]" Another, from an unidentified phone number, read: "Hey wendy . . . its me valerie. I was just wondering if u got some? I aint got n e connects here in town (yuma) :) [.]"[2] At trial, Angulo explained that "a connect" is a slang term for a dealer in methamphetamine. And, according to Angulo, in the "point-for-point system" operating in the methamphetamine market, being "in need of 15" means that someone wants $15 worth (i.e., 0.15 grams) of the drug.

¶8 On August 19, 2010, a grand jury indicted Defendant on three counts: Count 1, possession of dangerous drugs for sale; Count 2, transportation of dangerous drugs for sale; and Count 3, possession of drug paraphernalia. In April 2011, Defendant was represented by counsel at a three-day jury trial, during which an expert confirmed that the substance in the balloon was methamphetamine. At the end of the trial, the jury found Defendant guilty of the lesser included offense (possession of dangerous drugs) on Count 1; on Count 2, the jury was hung (the court declared a mistrial as to that count); and

[2] Here, the ellipsis marks do not signify that we have omitted a portion of the text message. The ellipsis marks were part of the original text.

on Count 3, the jury found Defendant guilty. Because Defendant's offenses did not require mandatory prison time, she was allowed to remain out of custody on bond until sentencing.

¶9 With her trial attorney serving as advisory counsel, Defendant represented herself at the August 19, 2011 sentencing hearing. During that hearing, the state moved under A.R.S. § 13-3968 for the revocation of Defendant's release. Officer Corthell, a deputy sheriff, testified that he had served a search warrant on Defendant's house on August 6, 2011. There, he found a baggie with methamphetamine residue, a scale, more than a hundred empty baggies, a glass spoon and a pipe. He also found a "drug ledger," containing initials and dollar amounts, inside of a book-shaped box that was marked "The Wendy Copp Story." The court, finding probable cause that Defendant had committed a drug-related felony during her release, ordered her to be held without bond.

¶10 The sentencing hearing was continued to August 31. On that date, the court, suspending imposition of sentence as to both counts, placed Defendant on probation for 48 months for Count 1 and 36 months for Count 3. As part of the probation for Count 3, the court also ordered Defendant jailed for 120 days. Defendant timely appeals.

DISCUSSION

¶11 We have read the brief written by counsel, and we have reviewed the entire record. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. On Count 3, Defendant was convicted for possessing drug paraphernalia. The term "drug paraphernalia" is broadly defined to include any "equipment, products and materials" used for "storing, containing, [or] concealing" a prohibited drug. A.R.S. § 13-3415(F)(2). Here, the multicolored balloon holding methamphetamine qualified as paraphernalia, and the jury had sufficient evidence to conclude that the balloon, found in the front seat of Defendant's car soon after she exited, was in her possession.

¶12 On Count 1, which was originally charged as possession of dangerous drugs for sale, Defendant was convicted for the lesser included offense of possession of dangerous drugs under A.R.S. § 13-3407(A)(1). The evidence supporting Defendant's paraphernalia conviction also supports her conviction for possession of methamphetamine (a drug classified as dangerous in § 13-3401(6)(b)(xv)): the methamphetamine was on the console of the car she owned and had just been driving.

¶13 Although she raised no challenge to that conviction in any supplemental brief, Defendant did challenge its validity during the August 19 sentencing hearing. There, she told the trial court that when her case came to the Court of Appeals, it

would be overturned "due to the lesser charge of the offense." Defendant was referring to the fact that Count 1's lesser included offense -- possession of dangerous drugs -- had been included in the jury instructions on the court's own motion. The state had not requested the instruction, and defense counsel objected to its inclusion "for the record."

¶14 An instruction on a lesser offense is proper if two conditions are met: first, the lesser offense must be included in the offense charged; second, the evidence must support the giving of the instruction. *State v. Dugan*, 125 Ariz. 194, 195, 608 P.2d 771, 772 (1980). A lesser offense is said to be "included" in the greater if it is necessarily committed whenever the greater offense is committed. *State v. Wall*, 212 Ariz. 1, 3, ¶ 14, 126 P.3d 148, 150 (2006). And the evidence supports giving the lesser-included-offense instruction if the jury could rationally find that the state, despite failing to prove an element of the greater offense, proved all of the elements of the lesser offense. *Dugan*, 125 Ariz. at 195-96, 608 P.2d at 772-73.

¶15 Here, both conditions were met. Possessing a dangerous drug for sale includes the lesser offense of possessing such a drug. And, as the trial court noted, the jury could rationally find that one of the greater offense's elements was unproved and conclude that Defendant "was in possession of

the drugs, but not for the purpose of sale." Further, although defense counsel did not want the instruction given because of his trial strategy, he conceded that a lesser-included-offense instruction would be "completely proper." We agree: the trial court properly instructed the jury. *See State v. McAlvain*, 104 Ariz. 445, 448, 454 P.2d 987, 990 (1969) (recognizing the trial court's "duty to instruct on the general principles of law pertaining to the case regardless of whether the defendant requests such instructions").

CONCLUSION

¶16 We have reviewed the record for fundamental error and find none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. All proceedings were conducted according to the Arizona Rules of Criminal Procedure, the evidence presented at trial supports the verdicts, and Defendant's probationary terms were within the parameters of the law. Accordingly, we affirm Defendant's convictions and probationary periods. Defense counsel's obligations pertaining to this appeal have come to an end. *See State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Unless, upon review, counsel discovers an issue appropriate for petition for review to the Arizona Supreme Court, counsel must only inform Defendant of the status of this appeal and her future options. *Id.* Defendant has 30 days from the date of this decision to file a petition for review *in*

propria persona. *See* Ariz. R. Crim. P. 31.19(a). Upon the court's own motion, Defendant has 30 days from the date of this decision in which to file a motion for reconsideration.

/s/
_____
PETER B. SWANN, Presiding Judge

CONCURRING:

/s/
_____
MICHAEL J. BROWN, Judge

/s/
_____
JON W. THOMPSON, Judge