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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. RICHARD TITUS SPEER, Appellant.	2 CA-CR 2011-0077 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR201000372

Honorable James L. Conlogue, Judge

AFFIRMED IN PART; MODIFIED IN PART

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V Á S Q U E Z, Presiding Judge.

¶1 Richard Speer appeals from his conviction and sentence for transportation of marijuana for sale having a weight of two pounds or more. He argues the trial court erred by (1) failing to "direct a verdict of acquittal" based on insufficient evidence of the "for sale" element of the offense; (2) refusing to instruct the jury on the lesser-included offenses of possession for sale and simple possession of marijuana; (3) sentencing him for a class two felony when there was no jury finding as to the weight of the marijuana being transported; (4) improperly considering his failure to take responsibility for his actions at sentencing; and (5) imposing a fine in excess of that permitted by law. For the reasons set forth below, we affirm Speer's conviction, but modify his sentence by reducing the fine imposed to the statutory maximum.

Background

¶2 On April 18, 2010, United States Border Patrol Agent Frank Agudio was assigned to work the primary inspection lane of a Border Patrol checkpoint near Willcox. Around 8:30 p.m. a gold Cadillac DeVille pulled up and Agudio became suspicious when the driver, later identified as Speer, "continued to look directly straight ahead" and never made eye contact, even after Agudio greeted him. Agudio's suspicion was further aroused by two cell phones on the front passenger seat. The only other occupants of the vehicle were two small children sitting in the backseat.

¶3 Agudio asked for permission to search the trunk and Speer consented. When Speer opened the trunk, Agudio noticed a strong odor of marijuana and saw two large plastic trash bags that appeared to be full sitting inside. Canine Officer James Cowper informed Agudio that his dog had alerted to an odor of narcotics coming from

the vehicle. Agudio and Cowper searched the trash bags and found twenty-two cellophane-wrapped "bricks" and one wrapped "bundle" of marijuana. Speer and the vehicle then were transported to the Willcox Border Patrol station where it was determined that Speer was the registered owner of the car and that the marijuana found in the trunk weighed 79.5 pounds. A later inspection under the hood of the Cadillac revealed two jars containing an additional 1.1 pounds of marijuana wrapped in a pink towel.

¶4 Speer was charged with transporting marijuana for sale having a weight of two pounds or more, a class two felony. After a jury trial, he was convicted as charged and the trial court imposed a presumptive sentence of five years in prison. The court also imposed a fine in the amount of $193,440. This appeal followed.

Discussion

Sufficiency of the Evidence

¶5 Speer first maintains the trial court erred in failing to "direct a verdict of acquittal" pursuant to Rule 20, Ariz. R. Crim. P., arguing the state failed to present any evidence of the "for sale" element of the offense. Speer acknowledges that he did not move for a judgment of acquittal on this basis at trial; we therefore review only for fundamental error. *State v. Windsor*, 224 Ariz. 103, n.2, 227 P.3d 864, 865 n.2 (App. 2010). "To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *State v. Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d 601, 607 (App. 2005). Fundamental error

occurs when a conviction is not supported by substantial evidence of guilt. *See State v. Fimbres*, 222 Ariz. 293, ¶ 23, 213 P.3d 1020, 1027 (App. 2009).

¶6 Substantial evidence is proof that "reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt." *State v. Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d 912, 914 (2005), *quoting State v. Hughes*, 189 Ariz. 62, 73, 938 P.2d 457, 468 (1997). "When considering claims of insufficient evidence, 'we view the evidence in the light most favorable to sustaining the verdict and reverse only if no substantial evidence supports the conviction.'" *Fimbres*, 222 Ariz. 293, ¶ 4, 213 P.3d at 1024, *quoting State v. Pena*, 209 Ariz. 503, ¶ 7, 104 P.3d 873, 875 (App. 2005). Evidence sufficient to support a conviction can be direct or circumstantial. *Pena*, 209 Ariz. 503, ¶ 7, 104 P.3d at 875. And we will reverse a conviction "only if 'there is a complete absence of probative facts to support [the jury's] conclusion.'" *State v. Carlisle*, 198 Ariz. 203, ¶ 11, 8 P.3d 391, 394 (App. 2000), *quoting State v. Mauro*, 159 Ariz. 186, 206, 766 P.2d 59, 79 (1988).

¶7 To support a conviction under A.R.S § 13-3405(A)(4), the state needed to prove that Speer knowingly transported marijuana for sale. *See State v. Fierro*, 220 Ariz. 337, ¶ 14, 206 P.3d 786, 789 (App. 2008); *State v. Cheramie*, 218 Ariz. 447, ¶ 10, 189 P.3d 374, 376 (2008) (reciting the elements of transportation for sale generally). The trial court instructed the jury that the term "sale" is defined by statute as "an exchange for anything of value." *See* A.R.S. § 13-3401(32).

¶8 Speer contends that although "[n]umerous law enforcement officers and agents testified . . . not one offered any testimony that the marijuana . . . was 'for sale.'"

He argues that, in the absence of such testimony, the "for sale" element of the offense could not be inferred from the quantity and packaging of the marijuana alone. The state counters that in *State v. Olson*, 134 Ariz. 114, 118, 654 P.2d 48, 52 (App. 1982), this court concluded the intent to sell could be inferred where the quantity of drugs—as in that case—was as little as 13.7 pounds. The state further contends that in *State v. Harrison*, 111 Ariz. 508, 510, 533 P.2d 1143, 1145 (1975), our supreme court held that the intent to sell can be inferred from the "large quantity of marijuana found" and "the nature of its packaging."

¶9 Contrary to the state's argument, in *Olson* the court expressly stated it was not deciding whether the quantity of marijuana was, "standing alone, legally sufficient to support a conviction of possession for sale." 134 Ariz. at 118, 654 P.2d at 52. Speer maintains the state's reliance on *Harrison* also is misplaced. He argues *Harrison* relied on *State v. Arce*, 107 Ariz. 156, 160-61, 483 P.2d 1395, 1399-1400 (1971), which involved testimony from law enforcement officers that the quantity of drugs and the nature of its packaging suggested it was for sale. And he contends *Arce* and, by extension, *Harrison* thus require such testimony to support the state's theory that drugs are for sale. We disagree.

¶10 Nothing in *Harrison* suggests such testimony was elicited in that case. And in *Arce*, our supreme court explained that the "for sale" element can be shown by circumstantial evidence. It cited two California cases for the proposition that the amount, packaging, and location of narcotics are sufficient to support an inference that the narcotics were possessed for sale. *Id.* at 160, 483 P.2d at 1399; *see also People v.*

Campuzano, 61 Cal. Rptr. 695, 697 (App. 1967); *People v. Robbins*, 37 Cal. Rptr. 244, 248 (App. 1964). The court further noted "[i]t was the function of the jury to decide what reasonable inferences could be drawn from the evidence." *Arce*, 107 Ariz. at 161, 483 P.2d at 1400.

¶11 Here the jury reasonably could have inferred Speer had transported the marijuana found in his vehicle and that it was for sale. The 79.5 pounds of marijuana found in the trunk had been packaged in twenty-two cellophane-wrapped "bricks" and one wrapped "bundle." We conclude the evidence of the marijuana's quantity and packaging was sufficient to support a finding of guilt beyond a reasonable doubt. *See Harrison*, 111 Ariz. at 510, 533 P.2d at 1145; *Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d at 913-14 (defining substantial evidence); *see also State v. Aguilar*, 169 Ariz. 180, 182, 818 P.2d 165, 167 (1991) (jurors entitled to rely on common sense in deciding case). The trial court therefore did not err, fundamentally or otherwise, in failing to enter a judgment of acquittal.

Jury Instructions – Lesser-Included Offenses

¶12 Speer next contends the trial court abused its discretion when it refused to instruct the jury on the lesser-included offenses of possession of marijuana for sale and simple possession as both he and the state had requested. He argues the court should have given the instructions because marijuana was found in two separate locations in his vehicle—in the trunk and under the hood—and the jury could have found that the state failed to prove the elements of knowledge and "for sale" as to the marijuana in the trunk, while also finding he had knowledge of the smaller quantity of marijuana in the engine

compartment and that it was not for sale. We review a trial court's decision to refuse a jury instruction on a lesser-included offense for an abuse of discretion. *State v. Price*, 218 Ariz. 311, ¶ 21, 183 P.3d 1279, 1284 (App. 2008).

¶13 A trial court must instruct the jury on a lesser-included offense if the evidence supports it. *State v. Vickers*, 159 Ariz. 532, 542, 768 P.2d 1177, 1187 (1989); *see also* Ariz. R. Crim. P. 23.3 (trial court must furnish forms of verdicts on all offenses "necessarily included in the offense charged"). The evidence is sufficient to require a lesser-included offense instruction if the jury could find "(1) the state failed to prove an element of the greater offense, and (2) the evidence is sufficient to support a conviction on the lesser offense." *State v. Hargrave*, 225 Ariz. 1, ¶ 33, 234 P.3d 569, 579 (2010). "[T]o warrant a separate instruction, 'the evidence must be such that a rational juror could conclude that the defendant committed only the lesser offense.'" *State v. Price*, 218 Ariz. 311, ¶ 21, 183 P.3d 1279, 1284, *quoting State v. Wall*, 212 Ariz. 1, ¶ 18, 126 P.3d 148, 151 (2006).

¶14 Possession of marijuana for sale is a lesser-included offense of transportation of marijuana for sale, and simple possession is a lesser-included offense of both transportation of marijuana and possession of marijuana for sale. *State v. Chabolla-Hinojosa*, 192 Ariz. 360, ¶¶ 12, 15, 965 P.2d 94, 97, 98 (App. 1998). "Transportation" is the element that distinguishes transportation of marijuana for sale from possession of marijuana for sale, *id.* ¶ 16, and the "for sale" element distinguishes both of these offenses from simple possession, *see* A.R.S. § 13-3405(A)(1).

¶15 We agree with the trial court that there was no factual basis for instructing the jury on the lesser-included offense of possession of marijuana for sale. It is undisputed the marijuana had been found in Speer's vehicle and was being transported. A rational jury could not have found otherwise. *See State v. Jackson*, 186 Ariz. 20, 27, 918 P.2d 1038, 1045 (1996) (test is whether jury "'could rationally fail to find the distinguishing element of the greater offense'"), *quoting State v. Krone*, 182 Ariz. 319, 323, 897 P.2d 621, 625 (1995). As to simple possession, we also do not believe a rational jury could conclude that Speer had knowledge of the marijuana in the engine compartment but had no knowledge of the marijuana in the trunk, given the fact that he was driving his own vehicle and had offered no theory or explanation that would cast reasonable doubt on the state's case. Moreover, we believe no rational jury could conclude that he possessed 79.5 pounds of marijuana for personal use rather than for sale. *See Jackson*, 186 Ariz. at 27, 918 P.2d at 1045. The trial court did not abuse its discretion by refusing to instruct the jury on the lesser-included offenses.

Verdict Form – Jury Determination of Weight

¶16 Speer next claims the trial court committed fundamental error "when it sentenced him for the class two felony of transportation of marijuana for sale when the jury verdict contained no jury finding of the weight of the marijuana transported." Speer maintains that even though the jury instructions recited the elements and burden of proof as to the crime charged, "it is the form of verdict and not the particular jury instruction that controls which finding was made." Because Speer did not raise this issue in the trial

court, we review only for fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607.

¶17 Transportation of marijuana for sale is a class three felony if the marijuana involved has a weight of less than two pounds, but is a class two felony if the marijuana has a weight of two pounds or more. A.R.S. § 13-3405(B)(10), (11). Thus, the weight of the marijuana is an element of the transportation for sale charge that must be proven by the state and found by the jury beyond a reasonable doubt. *See State v. Aragon*, 185 Ariz. 132, 133-34, 912 P.2d 1361, 1362-63 (App. 1995) (weight of marijuana an element of crime in possession for sale charge).

¶18 Speer relies primarily on *State v. Virgo*, 190 Ariz. 349, 947 P.2d 923 (App. 1997), to support his argument that the verdict form must include a finding as to the weight of the marijuana. There, Virgo was indicted for one count of possession of marijuana for sale and one count of transportation for sale. *Id.* at 350, 947 P.2d at 924. At trial, the jury was instructed that the parties had stipulated the marijuana weighed thirty-five pounds. *Id.* The trial court also instructed the jury on the lesser-included offense of simple possession of marijuana. *Id.* The jury acquitted Virgo of the original charges but found him guilty of two lesser-included counts of possession of marijuana. *Id.* Although the verdict forms for the charges of transportation and possession for sale required the jury to make a finding regarding the marijuana's weight, neither the verdict form nor the jury instructions required the same for the simple possession charge. *Id.* at 351, 947 P.2d at 925. At sentencing, the trial court relied on the parties' stipulation "and treated the convictions as class 4 felonies under A.R.S. § 13-3405(B)(3) (involving over

four pounds of marijuana), rather than class 6 felonies under A.R.S. § 13-3405(B)(1) (involving less than two pounds of marijuana)." *Id.* at 352, 947 P.2d at 926. On appeal, this court held that the use of the stipulation at sentencing improperly invaded the province of the jury because the weight element had been decided solely by the trial court and not by the jury. *Id*. at 354, 947 P.2d at 928. Contrary to Speer's argument, *Virgo* does not stand for the broad proposition that the verdict form must include a finding as to the weight of the drugs involved for that element to have been found by the jury.[1]

¶19 Here, Speer was charged with a single count of transportation of marijuana for sale with a weight of two pounds or more, a class two felony, and the jury was instructed only on that offense. Consequently, a guilty verdict on that charge necessarily included a jury finding that the marijuana had a weight of two pounds or more. *See* Ariz. R. Crim. P. 23.2(a) (approving, in all cases, "General Verdicts," in which jury "render[s] a verdict finding the defendant either guilty or not guilty"; *State v. Lamb*, 17 Ariz. App. 246, 249, 497 P.2d 66, 69 (1972) ("Our Supreme Court has approved the use of general verdicts which specify whether a defendant is guilty or not guilty as charged in the information."); *State v. Washington*, 103 Ariz. 605, 606, 447 P.2d 863, 864 (1968) (single offense charged; "verdict is adequate and sufficient if it states the defendant is guilty or

[1]For the same reason, we find Speer's reliance on *State v. Aragon*, 185 Ariz. 132, 912 P.2d 1361 (App. 1995), unavailing. There, although the court noted that the "issue was not submitted to the jury by the forms of the verdict," and made clear that "the weight of the marijuana . . . must be pleaded, proved and found by the jury," *id.* at 134, 912 P.2d at 1363, the court did not hold that verdict forms must include an express jury finding as to the weight of the drugs.

not guilty and no reference to the crime charged or the elements of the crime is necessary").

¶20 And here, Speer does not dispute that the total weight of the marijuana found in his vehicle was 80.6 pounds. Notably, in its closing argument, the state specifically referred to the elements of the charge, including that it was required to prove, and the jury had to find, that the marijuana weighed two pounds or more. *See State v. Far W. Water & Sewer Inc*., 224 Ariz. 173, ¶ 81, 228 P.3d 909, 932 (App. 2010) ("'In evaluating the jury instructions, we consider the instructions in context and in conjunction with the closing arguments of counsel.'"), *quoting State v. Johnson*, 205 Ariz. 413, ¶ 11, 72 P.3d 343, 347 (App. 2003). Thus, unlike in *Virgo*, the trial court here did not "add[] an element to the jury's verdicts" that had not been found by the jury. 190 Ariz. at 352, 947 P.2d at 926. Rather, the jury "explicitly adopted" the weight of the marijuana established by the undisputed evidence by finding Speer guilty based on the elements of the offense as stated in the jury instructions and in the state's closing argument. *See id*. at 354, 947 P.2d at 928; *see also State v. Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d 833, 847 (2006) (we presume jurors follow jury instructions).

¶21 Moreover, Speer cannot show he was prejudiced by the failure to include the weight element in the verdict form. His claim of prejudice rests on the fact that "the marijuana was located in two distinct and separate compartments of the vehicle" and that "[t]he jury, as factfinder, was free to believe that Mr. Speer . . . transported some, all, or none . . . of the marijuana in the vehicle." But that fact would be present whether or not the verdict form contained the weight element. If the jury believed the defense theory, it

could have found Speer not guilty of transporting two pounds or more of marijuana for sale. There was no error.

Sentencing - Failure to Take Responsibility

¶22 Speer next argues the trial court erred at sentencing when it "consider[ed his] failure to accept responsibility and/or say that he made a mistake." Speer asserts that had the court not considered this factor, in light of other mitigating factors, there was a "reasonable likelihood that [he] would have received a more favorable sentence."[2]

¶23 "Unless a specific sentence is otherwise provided, the term of imprisonment for a first felony offense shall be the presumptive sentence determined pursuant to subsection D of [A.R.S. § 13-702]."[3] § 13-702(A). The trial court may reduce or increase the sentence based on aggravating or mitigating circumstances identified in A.R.S. § 13-701(D) and (E). In determining what sentence to impose, and whether to impose a mitigated sentence, the court may consider "any evidence or information introduced or submitted to the court." § 13-702(C). A defendant's refusal to acknowledge his guilt, however, is irrelevant to a sentencing determination; it "is neither

[2]Both parties urge us to review this argument for fundamental, prejudicial error, as the argument was not raised before the trial court. However, in *State v. Vermuele*, this court held the defendant there had not forfeited his sentencing error claims "[b]ecause a trial court's pronouncement of sentence is procedurally unique in its finality under our rules . . . and because a defendant has no appropriate opportunity to preserve any objection to errors arising during the court's imposition of sentence . . . ." 226 Ariz. 399, ¶ 6, 249 P.3d 1099, 1101 (App. 2011). Because the same principles apply here, this argument has not been forfeited and we review for plain error.

[3]The sentencing range for a class two felony offense committed by a first-time felony offender is as follows: the aggravated term of imprisonment is 12.5 years, the maximum is ten years, the presumptive is five years, the minimum is four years, and the mitigated term is three years. A.R.S. § 13-702(D).

mitigating nor a fact that should be held against [the defendant]." *See State v. Carriger*, 143 Ariz. 142, 162, 692 P.2d 991, 1011 (1984) ("A defendant is guilty when convicted and if he chooses not to publicly admit his guilt, that is irrelevant to a sentencing determination."); *see also State v. Hardwick*, 183 Ariz. 649, 656, 905 P.2d 1384, 1391 (App. 1995) (trial court's use of defendant's decision not to publicly admit guilt to aggravate defendant's sentence "offends the Fifth Amendment privilege against self-incrimination"). On the other hand, the defendant's admission of guilt "can be used as additional mitigating evidence, provided the defendant is truly remorseful for his crime." *Carriger*, 143 Ariz. at 162, 692 P.2d at 1011.

¶24 At sentencing, the trial court stated it had found several mitigating factors, including Speer's lack of criminal record and numerous letters submitted on Speer's behalf. The court, however, expressed its concern that Speer had "not been able to take any responsibility" for his actions. Specifically, addressing Speer, the court stated:

> I am . . . concerned by the fact that you have not been able to take any responsibility in this matter. It's been somebody else's fault throughout from the start. You have not been able to say even one time that you even made a mistake or anything else, and that presents a difficulty for the Court.
>
> If you were able to take responsibility, I think that that would be a very significant mitigating circumstance to weigh in the balance. But without that, I do find that the mitigating circumstances are offset by the aggravating circumstances, and I am very disappointed about that, Mr. Speer. I did not expect you to go through this matter without taking any responsibility whatsoever.

¶25 Although this is a close issue, contrary to Speer's assertion, it does not appear the court was "considering" the lack of remorse either as a mitigating or aggravating factor. Rather, the court simply noted that had Speer acknowledged responsibility for his actions, the court would have deemed this to be "a very significant mitigating circumstance." *See Carriger*, 143 Ariz. at 162, 692 P.2d at 1011 (defendant's admission of guilt "can be used as additional mitigating evidence"). But because Speer had not accepted responsibility or showed remorse, the court considered only the mitigating circumstances presented to it, and after weighing the mitigating and aggravating factors,[4] the court determined that a presumptive term was justified. We therefore conclude the trial court committed no error in sentencing Speer.

Sentencing - Fine

¶26 Finally, Speer maintains the trial court erred when it imposed a fine of $193,440. He first contends, and the state concedes, that the fine was in excess of the statutory maximum. Because Speer did not object below, we review for fundamental error. *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. Imposition of an unlawful sentence constitutes fundamental error. *State v. Munninger*, 213 Ariz. 393, ¶ 11, 142 P.3d 701, 705 (App. 2006). "An unlawful sentence is one that is outside the statutory range." *State v. House*, 169 Ariz. 572, 573, 821 P.2d 233, 234 (App. 1991).

[4]Although the trial court did not expressly identify them as aggravating circumstances, it noted the "large quantity of marijuana" and its "concern[] about [Speer's] family, and the kids." And in imposing the presumptive sentence, it stated that "the mitigating circumstances are offset by the aggravating circumstances." Speer does not challenge these findings on appeal.

¶27 Section 13-3405(D) provides that

> [i]n addition to any other penalty prescribed by this title, the court shall order a person who is convicted of a violation of any provision of this section to pay a fine of not less than seven hundred fifty dollars or three times the value as determined by the court of the marijuana involved in or giving rise to the charge, whichever is greater, and not more than the maximum authorized by chapter 8 of this title.

The maximum amount authorized is $150,000. A.R.S. § 13-801(A).[5] The trial court calculated the fine of $193,440 by determining three times the street value of the marijuana pursuant to § 13-3405(D). But, because this amount exceeds the statutory maximum fine, the court fundamentally erred in imposing it. We therefore reduce the amount of the fine to comply with the statutory maximum of $150,000.[6]

[5]Speer "notes" that A.R.S. § 13-3405(D) allows for imposition of a fine based upon a greater amount of marijuana than a defendant is convicted of possessing, in violation of Fifth and Sixth Amendment rights. He points out that under the statute, the fine is based on the amount of marijuana "involved in or giving rise to the charge," allowing the court to impose a fine based on a greater amount the defendant was initially charged with possessing instead of a lesser amount the defendant was actually convicted of possessing. Because Speer does not rely on this assertion to support his argument or develop and support his assertion with any authority, we do not address it further. *See* Rule 13(a)(6), Ariz. R. Civ. App. P. (appellate briefs shall contain "[a]n argument . . . [with] the contentions of the appellant with respect to the issues presented . . . with citations to the authorities, statutes and parts of the record relied on").

[6]Speer also contends the fine was "not supported by the verdict" based on his argument that he could only be sentenced for a conviction for transportation of marijuana for sale with a weight less than two pounds. We reject this claim for the reasons stated above and therefore affirm the fine as reduced to comply with the statutory maximum.

Disposition

¶28 For the reasons stated above, Speer's conviction is affirmed, and his sentence is modified to reflect that the fine imposed is reduced to $150,000 pursuant to § 13-801(A), plus applicable assessments, fees and surcharges.[7]

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

CONCURRING:

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

[7]Pursuant to A.R.S. § 13-808(C), "[t]he amount of restitution, assessments, incarceration costs and surcharges is not limited by the maximum fine that may be imposed under § 13-801 or 13-802."