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

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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. JOHN ROSALIO JARROTT, Appellant.	2 CA-CR 2011-0271 DEPARTMENT B <u>MEMORANDUM DECISION</u> Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR201000882

Honorable Ann R. Littrell, Judge

AFFIRMED IN PART; VACATED IN PART AND REMANDED

Thomas C. Horne, Arizona Attorney General
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Attorneys for Appellee

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Attorney for Appellant

K E L L Y, Judge.

¶1 After a jury trial, appellant John Jarrott was convicted of one count of possession of a dangerous drug for sale, one count of transportation of a dangerous drug for sale, and two counts of transportation of a narcotic drug for sale. He was sentenced to

a combination of concurrent and consecutive, partially mitigated terms of imprisonment totaling sixteen years. On appeal, he argues the trial court erred in allowing the state to file an untimely response to his motions to suppress evidence and by denying the motions, convicting him of both possession of methamphetamine for sale and transportation of methamphetamine for sale in violation of double jeopardy principles, and effectively sentencing him to aggravated sentences on counts three and five without properly finding aggravating factors. He also claims the prosecutor committed misconduct during closing argument. For the reasons that follow, we vacate Jarrott's sentences on counts three and five and remand for resentencing. In all other respects, we affirm.

Background

¶2 We view the facts in the light most favorable to sustaining the verdicts. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). An Arizona Department of Public Safety (DPS) officer performed a traffic stop of a vehicle owned by Jarrott in which he was a passenger. After discovering the driver had a suspended license, the officer seized the vehicle for impoundment, conducted an inventory search and called for a canine unit and a tow truck. Before the tow truck arrived, a dog alerted to the vehicle's exterior and to the console area inside the vehicle. Officers searched the console and discovered numerous, separately packaged narcotic drugs including methamphetamine, heroin, and cocaine.

¶3 After Jarrott was arrested and taken to the police station, he admitted to a detective that he owned the methamphetamine and heroin found in the vehicle. During

the same interview, Jarrott revealed he had a plastic bag containing methamphetamine concealed in his rectum.

¶4 Jarrott was charged with eight drug-related offenses.[1] Before trial, he filed and the court denied several motions to suppress evidence. He was convicted and sentenced as above and this appeal followed.

Discussion

Motions to Suppress

State's Response: Timeliness and Preclusion

¶5 Jarrott claims the state did not timely file its response to his motions to suppress and the trial court therefore erred in refusing to preclude it pursuant to Rule 16.1, Ariz. R. Crim. P. We review a trial court's decision to consider an untimely motion, rather than preclude it, for abuse of discretion. *State v. Vincent*, 147 Ariz. 6, 8-9, 708 P.2d 97, 99-100 (App. 1985).

¶6 Jarrott filed his motions to suppress on April 8. At an April 22 hearing on the motions, Jarrott informed the trial court that the state had not filed a response to his motions within the required ten-day period and asked the court to "rule on the pleadings." *See* Ariz. R. Crim. P. 16.1(b) (response to pretrial motion must be filed within ten days). The state responded that it had not received Jarrott's motions until seven days before the hearing date and offered to file a response within ten days of receipt of the motions if the court deemed it necessary. The court stated that it was "to the State's disadvantage not to

[1]The trial court entered judgments of acquittal on three counts and dismissed the remaining count.

have an opportunity to file something in writing citing the legal authority for their position" and "[d]epending on what happen[ed]" as a result of the hearing, it might allow the state to file written arguments at its conclusion. The court denied Jarrott's motions at the end of the hearing except as to a single issue, which it took under advisement. On the same day, the state filed a response addressing the remaining issue. After Jarrott filed a reply, the court issued a written ruling denying all the motions.

¶7 Whether or not the state's response was untimely under Rule 16.1(b), Jarrott has not established that the trial court was required to preclude it.[2] Although Rule 16.1(c) provides for preclusion of motions and objections not timely raised, because the "trial court has the power to extend the time to file motions, it also has the discretion to hear late motions." *State v. Zimmerman*, 166 Ariz. 325, 328, 802 P.2d 1024, 1027 (App. 1990); *see also State v. Alvarez*, 228 Ariz. 579, ¶ 11, 269 P.3d 1203, 1206 (App. 2012). Preclusion "is a judicial remedy designed to protect judicial interests. Its invocation, therefore, rests in the discretion of the trial court subject to review only for abuse." *Vincent*, 147 Ariz. at 8-9, 708 P.2d at 99-100. Preclusion should be imposed only in

[2]We cannot ascertain from the record whether the trial court treated the response as having been filed timely. At the suppression hearing, Jarrott's counsel asserted the motions had been delivered to the state by messenger service on April 8. The prosecutor told the court he received them a week before the hearing, which would have been on or about April 15. Under Rule 1.3, Ariz. R. Crim. P., a party has five additional days to respond to a motion served by a method authorized by Rule 5(c)(2)(C) or (D), Ariz. R. Civ. P. But here, the manner in which service actually was made is not clear on the certificates of service, which state only that they were "mailed/delivered." And when the "precise manner" of service is not noted on the certificate of service, there is a conclusive presumption the paper was served by mail. Ariz. R. Civ. P. 5(c)(3). Although it appears the state's response may indeed have been timely, the court made no findings regarding the timeliness issue.

"instances where it will fairly serve the interest in judicial administration by punishing those who for tactical reasons seek to subvert that interest." *Id*. at 8, 709 P.2d at 99. Jarrott has not explained why allowing the state to file a response, to which he filed a reply, constituted an abuse of the court's discretion.[3] We therefore conclude the court did not err in considering the state's response.[4]

Denial of Motions

¶8 Jarrott argues the trial court erred in denying his motions to suppress. We review the court's ruling on a motion to suppress evidence for an abuse of discretion to the extent it involves a discretionary issue, but we review constitutional and legal issues de novo. *See State v. Gay*, 214 Ariz. 214, ¶ 4, 150 P.3d 787, 790 (App. 2007). We consider only the evidence presented at the hearing on the motion to suppress, *State v. Spears*, 184 Ariz. 277, 284, 908 P.2d 1062, 1069 (1996), and we view it in the light most favorable to sustaining the court's ruling. *State v. Rosengren*, 199 Ariz. 112, ¶ 2, 14 P.3d 303, 306 (App. 2000).

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[3]Because a response was filed by the state and the trial court had discretion to consider it, we likewise reject Jarrott's contention that the court was required to preclude the response based on Rule 35.1(a), Ariz. R. Crim. P., which states "[i]f no response is filed, the motion shall be deemed submitted on the record before the court."

[4]Jarrott also asserts the trial court's consideration of the state's response violated due process. He has not developed this argument and it is therefore waived. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (issue waived when argument insufficient to permit appellate review); *see also State v. Moody*, 208 Ariz. 424, n.9, 94 P.3d 1119, 1147 n.9 (2004) (mere mention of argument in opening brief not enough; argument must be developed or considered abandoned).

¶9 Jarrott first claims the inventory search of his vehicle violated the Fourth Amendment to the United States Constitution and article II, § 8 of the Arizona Constitution, which prohibit unreasonable searches and seizures. *See State v. Allen*, 216 Ariz. 320, ¶ 9, 166 P.3d 111, 114 (App. 2007). Inventory searches are a well-defined exception to the Fourth Amendment's probable cause and warrant requirements. *State v. Organ*, 225 Ariz. 43, ¶ 20, 234 P.3d 611, 616 (App. 2010). "An inventory search of a vehicle is valid if two requirements are met: (1) law enforcement officials must have lawful possession or custody of the vehicle, and (2) the inventory search must have been conducted in good faith and not used as a subterfuge for a warrantless search." *Id.* ¶ 21. "[A]n inventory search conducted pursuant to standard procedures is presumptively . . . conducted in good faith and therefore reasonable." *Id.*

¶10 As the trial court noted, the DPS officer impounded the vehicle upon discovering its driver had a suspended license. *See* A.R.S. § 28-3511(A)(1) (officer required to immobilize or impound vehicle when license of driver suspended). An inventory search then was conducted in accordance with standard DPS procedures. *See Organ*, 225 Ariz. 43, ¶ 21, 234 P.3d at 616. Although Jarrott asserts the search was invalid because "standardized routine procedures were not followed" he has not identified any procedural defects with the search nor has he alleged that it was not conducted in good faith. We agree with the court's ruling that the inventory search was lawful.

¶11 Jarrott next contends the trial court erred in determining the officer performing the traffic stop had reasonable suspicion to detain the vehicle until the canine

unit arrived. But the vehicle was detained because it was to be impounded, not because the officer had reasonable suspicion. § 28-3511(A)(1). And, as the court noted, when a vehicle is lawfully detained in a public area it may be subjected to a dog sniff without "reasonable suspicion of drug-related activity" because a dog sniff of the exterior of a car is not a search for the purposes of the Fourth Amendment. *State v. Box*, 205 Ariz. 492, ¶ 15, 73 P.3d 623, 627-28 (App. 2003). Therefore, the reasonableness of the officer's suspicion is irrelevant to the legality of the detention and subsequent search of the vehicle.

¶12 Jarrott next argues the statements he made to the police detective after his arrest were involuntary and therefore the trial court erred in refusing to suppress them. Statements made to a police officer must be voluntary to be admissible. *State v. Ellison*, 213 Ariz. 116, ¶ 30, 140 P.3d 899, 910 (2006). "A confession is 'prima facie involuntary and the state must show by a preponderance of the evidence that the confession was freely and voluntarily made.'" *State v. Newell*, 212 Ariz. 389, ¶ 39, 132 P.3d 833, 843 (2006), *quoting State v. Montes*, 136 Ariz. 491, 496, 667 P.2d 191, 196 (1983). When determining whether a statement is voluntary, the court "must look to the totality of the circumstances surrounding the confession and decide whether the will of the defendant has been overborne." *State v. Lopez*, 174 Ariz. 131, 137, 847 P.2d 1078, 1084 (1992).

¶13 Upon meeting with the detective, Jarrott agreed to waive his rights as set forth in *Miranda*,[5] asked immediately what the detective "could do for him" and

[5] *Miranda v. Arizona*, 384 U.S. 436 (1966).

expressed a desire to act as a confidential informant to "work off the charges that he was facing." The detective explained that while this was "possible," he could not make any promises or even "talk about that" before doing research on Jarrott's background and learning the facts of the case. Jarrott continued to urge that he had information and the detective responded, "Well fine. Tell me what's on your mind." Jarrett then stated the methamphetamine and heroin in the vehicle were his and provided the name of the person from whom he had purchased the drugs. Later in the interview, Jarrett also informed the detective that he "had an ounce of methamphetamine concealed in his rectum" that was "very uncomfortable," and asked to remove it. In denying the motion to suppress, the trial court concluded the detective had made no promise of leniency to Jarrott and the statements were voluntary. *See State v. Amaya-Ruiz*, 166 Ariz. 152, 165, 800 P.2d 1260, 1273 (1990) (to be voluntary, confession "cannot be induced by a direct or implied promise, however slight").

¶14 On appeal, Jarrott does not challenge the trial court's factual findings, but instead claims the court erred in relying upon *State v. McVay*, 127 Ariz. 18, 617 P.2d 1134 (1980) in making its determination of voluntariness. In that case, a prison inmate claimed his confession was involuntary because it had been provided in exchange for a guard's promise to mention the inmate's cooperation to the warden in connection with the inmate's request that he be released from isolation. *McVay*, 127 Ariz. at 20, 617 P.2d at 1136. In addressing the claim, our supreme court noted that when a "promise is couched in terms of a mere possibility or an opinion [it] is not deemed to be a sufficient promise so as to render a confession involuntary." *Id*. The court further noted that when

the promise relied upon was solicited by the defendant, he cannot claim the promise affected the voluntariness of his confession. *Id*. at 21, 617 P.2d at 1137.

¶15 Jarrott contends *McVay* is distinguishable from his case because there the prison guard promised only to relay the inmate's request to the warden whereas here, the detective had discretion to allow Jarrott to act as a confidential informant.[6] *See id*. at 20, 617 P.2d at 1136. But Jarrott has not explained nor can we determine, the significance of this distinction. As in *McVay*, the offer to cooperate was proposed by Jarrott and addressed by the detective as a "mere possibility." *Id*. The court properly relied on *McVay* in refusing to suppress Jarrott's statements.

Prosecutorial Misconduct

¶16 Jarrott argues the prosecutor committed misconduct by "agree[ing] to buy a juror lunch during closing arguments." Jarrott did not object at trial, and we therefore review solely for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005) (failure to object to alleged error in trial court results in forfeiture of review for all but fundamental error). Fundamental error is that "'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 the defendant could not possibly have received a fair trial.'" *Id*. ¶ 19, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982

[6]Jarrott also asserts the trial court "read *McVay* . . . to create a per se rule establishing that whenever a suspect initiates a conversation nothing in the . . . conversation can . . . be construed as improperly induced." The record provides no support for this assertion, and the court stated that it had considered the totality of the evidence in determining the statements were voluntary.

(1984). The defendant has the burden to show both that the error was fundamental and that it caused him prejudice. *Id.* ¶¶ 19-20.

¶17 "Prosecutorial misconduct 'is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial . . . .'" *State v. Aguilar*, 217 Ariz. 235, ¶ 11, 172 P.3d 423, 426-27 (App. 2007), *quoting Pool v. Superior Court*, 139 Ariz. 98, 108, 677 P.2d 261, 271 (1984). "To prove prosecutorial misconduct, the appellant must show: (1) the state's actions were improper; and (2) 'a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying defendant a fair trial.'" *State v. Montano*, 204 Ariz. 413, ¶ 70, 65 P.3d 61, 75 (2003), *quoting State v. Atwood*, 171 Ariz. 576, 606, 832 P.2d 593, 623 (1992), *disapproved of on other grounds by State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717 (2001).

¶18 During closing argument the following exchange occurred,

> [The Prosecutor]: I'm trying to hurry here because I don't want to be yelled at by the Judge.
>
> [Juror]: As long as he's buying lunch.
>
> [The Prosecutor]: I'm sorry?
>
> The Court: He said you'd buy lunch.
>
> [The Prosecutor]: Yeah. I'll do that.

Shortly afterward the prosecutor concluded his argument. The jury was excused for lunch recess and instructed by the court to remember the admonition.

¶19 Jarrott concedes the lack of objection to the statement at trial "suggests there [was] . . . humor in this exchange," but he asserts nevertheless that "[a] prosecutor agreeing to buy a sitting juror lunch is fundamental error." Jarrott offers no authority in support of this assertion and has not demonstrated that the statement amounted to improper conduct that created a reasonable likelihood the jury's verdict was affected, thereby denying him a fair trial. *See id.* ¶ 70. Rather, it appears from the record the statement was nothing more than banter and at most an insignificant impropriety. *Aguilar*, 217 Ariz. 235, ¶ 11, 172 P.3d at 426-27.

Double Jeopardy

¶20 Jarrott argues his convictions on counts one and two violate double jeopardy principles because count one, possession of methamphetamine for sale, is a lesser-included offense of count two, transportation of methamphetamine for sale. We review de novo whether a defendant's double jeopardy rights have been violated. *See State v. Brown*, 217 Ariz. 617, ¶ 12, 177 P.3d 878, 882 (App. 2008).

¶21 "The Double Jeopardy Clause bars . . . multiple punishments for the same offense." *State v. Powers*, 200 Ariz. 123, ¶ 5, 23 P.3d 668, 670 (App. 2001). Therefore when a defendant is convicted of a charged offense, double jeopardy prohibits an additional conviction for any lesser-included offense of that charge. *State v. Chabolla-Hinojosa*, 192 Ariz. 360, ¶ 10, 965 P.2d 94, 96-97 (App. 1998). As Jarrott argues and the state concedes, possession of a dangerous drug for sale can be a lesser-included offense of transportation of a dangerous drug for sale. However, this is so only when the possession is incidental to the transportation. *See id.* ¶ 8; *see also State v. Cheramie*, 218

Ariz. 447, ¶¶ 9-12, 189 P.3d 374, 375-76 (2008). As we explained in *Chabolla-Hinojosa*, "when the charged possession for sale is incidental to the charged transportation for sale, it is a lesser-included offense, for a person cannot commit the transportation offense without necessarily committing the possession offense." 192 Ariz. 360, ¶ 12, 965 P.2d at 97. However, double jeopardy is not invoked if the charges stem from separate conduct by the defendant. *Blockburger v. United States*, 284 U.S. 299, 302-03 (1932) (if individual acts prohibited, each is punishable separately); *see also State v. Eagle*, 196 Ariz. 27, ¶ 21, 992 P.2d 1122, 1126-27 (App. 1998) (double jeopardy implicated only when "same act or transaction" violates two distinct criminal statutes).

¶22 Count one alleged Jarrott had "knowingly possessed a dangerous drug, methamphetamine, for sale . . . having [a weight of] approximately 28.1 grams concealed within his body." Count two alleged Jarrott and his codefendant "knowingly transported a dangerous drug for sale, to wit: methamphetamine in a plastic bag containing a white crystalline substance." Jarrott contends that because he was an occupant of the car, the methamphetamine concealed within his body also was part of the methamphetamine concealed in the vehicle and therefore the "same drugs" supported both counts one and two.

¶23 We conclude however that Jarrott's possession for sale of the methamphetamine concealed in his rectum was not incidental to transportation for sale of the methamphetamine concealed in the vehicle's console. Jarrott could commit transportation for sale, based on the methamphetamine hidden in the vehicle, without consideration of the methamphetamine "concealed within his body." *See Chabolla-*

Hinojosa, 192 Ariz. 360, ¶ 12, 965 P.2d at 97. And, although count two was written more generally as "methamphetamine in a plastic bag containing a white crystalline substance," the evidence presented at trial supported the state's contention that count two referred to the methamphetamine concealed in the vehicle's console. The state introduced into evidence two separate quantities of methamphetamine and presented testimony about their packaging, weight, and where they were discovered. The methamphetamine concealed in the vehicle was packaged in a "little baggie" whereas the methamphetamine within Jarrott's body was described as a "cylindrical mass" contained within a white "grocery-type bag." A criminalist testified that exhibit 3a, the methamphetamine charged in count one, weighed 28.1 grams, whereas the methamphetamine found in the console, marked as exhibit 3b and charged in count two, weighed 12.6 grams—less than half the amount described in count one. Additionally, during his testimony the detective who interviewed Jarrott testified that the 28.1 gram package had been concealed in Jarrott's rectum.

¶24 Moreover, although Jarrott argues that the methamphetamine concealed in his body also was transported in the vehicle, it is significant that his possession of the methamphetamine in his rectum continued well after he left the vehicle. Indeed, the methamphetamine that formed the basis for count one was not discovered until after the vehicle had been seized and Jarrott was at the police station speaking with a detective. Because Jarrott continued to possess methamphetamine within his body after the offense of transportation of methamphetamine within the vehicle had been completed, count one was based on a separate "act or transaction," *Eagle*, 196 Ariz. 27, ¶ 21, 992 P.2d at 1126,

and was not incidental to the transportation alleged in count two, *Chabolla-Hinojosa*, 192 Ariz. 360, ¶ 12, 965 P.2d at 97. *See also Blockburger*, 284 U.S. at 302-03. We therefore find no violation of the prohibition against double jeopardy.[7]

Sentencing

¶25 Jarrott argues the trial court erred by imposing aggravated sentences on counts three and five without a jury finding aggravating factors as required by *Blakely v. Washington*, 542 U.S. 296 (2004). Jarrott did not object on this ground in the trial court to the sentences he now challenges on appeal. He therefore has forfeited review for all but fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607. However, "'[t]he failure to impose a sentence in conformity with mandatory sentencing statutes makes the resulting sentence illegal.'" *State v. Cox*, 201 Ariz. 464, ¶ 13, 37 P.3d 437, 441 (App. 2002), *quoting State v. Carbajal*, 184 Ariz. 117, 118, 907 P.2d 503, 504 (App. 1995). And imposition of an illegal sentence constitutes fundamental, prejudicial error. *State v. Zinsmeyer*, 222 Ariz. 612, ¶ 26, 218 P.3d 1069, 1080 (App. 2009); *Cox*, 201 Ariz. 464, ¶ 13, 37 P.3d at 441.

¶26 Counts one and two involved methamphetamine and carried presumptive terms of ten calendar years and minimum terms of five calendar years. *See* A.R.S. § 13-

[7]For this reason we also reject Jarrott's argument that the trial court's imposition of consecutive sentences on counts one and two violated A.R.S. § 13-116. Section 13-116 provides that "[a]n act . . . which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent." Because the counts refer to separate acts, § 13-116 does not apply.

3407(A)(2), (7), (E).[8] Counts three and five involved transportation of cocaine and hydrolyzed cocaine for sale and carried a presumptive term of five years and a maximum term of ten years. *See* A.R.S. §§ 13-702(D), 13-3408(A)(7), (B)(7). During the sentencing hearing, the trial court imposed what it described as a "somewhat mitigated sentence of eight years on each count." Accordingly, it appears that although the court intended to mitigate the sentences on each count, it effectively imposed aggravated sentences on counts three and five.

¶27 Jarrott contends, and we agree, that the aggravated sentences on counts three and five are not lawful under the circumstances here.[9] The Sixth Amendment right to a jury trial includes the right to have a jury determine, beyond a reasonable doubt, any fact legally required to increase the punishment for a crime beyond the prescribed statutory maximum, except for the fact of a prior conviction. *See Blakely*, 542 U.S. at 303-04; *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Our supreme court accordingly has held that a defendant's sentence may be increased beyond the

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[8]In addition to § 13-3407 the sentencing minute entry also cited former A.R.S. § 13-709.03 (2008) in imposing sentence on counts one and two. As Jarrott points out, at the time of sentencing § 13-709.03 had been repealed. *See* 2011 Ariz. Sess. Laws, ch. 90, § 3. However, that statute was in effect at the time the offense was committed. *See State v. Scrivner*, 125 Ariz. 508, 510, 611 P.2d 95, 97 (App. 1979) (defendant shall be sentenced under statute in effect at time offense committed). And in any event, the legislature merely consolidated the language of former § 13-709.03 with § 13-3407, which the trial court considered in imposing sentence. *See* 2011 Ariz. Sess. Laws, ch. 90, § 15; 2008 Ariz. Sess. Laws, ch. 301, § 34.

[9]Jarrott also claims his sentences on counts three and five were improper because the trial court failed to actually articulate the sentences on these counts. However, he withdraws this argument in his reply brief.

presumptive term only if: (1) the jury finds at least one aggravating factor, (2) the defendant waives the right to a jury determination by admitting the relevant facts or consenting to the trial court finding an aggravating factor, or (3) the judge or jury finds the fact of a prior conviction to be a valid aggravator. *State v. Price*, 217 Ariz. 182, ¶ 10, 171 P.3d 1223, 1226 (2007). When no valid aggravating factors have been found or admitted, the presumptive term is the maximum sentence that may be imposed. *State v. Martinez*, 210 Ariz. 578, ¶ 17, 115 P.3d 618, 623 (2005).

¶28 Here, neither the trial court nor the jury found any factor that could be used to aggravate Jarrott's sentences as *Blakely* requires. Further, Jarrott did not admit to relevant aggravating facts. Although the court considered aggravating factors including that the offenses were committed for pecuniary gain and the presence of an accomplice, these factors were not exempt under *Blakely* and thus could not support a sentence greater than the presumptive unless they had been found by a jury. *See Price*, 217 Ariz. 182, ¶ 10, 171 P.3d at 1226; *Martinez*, 210 Ariz. 578, ¶ 17, 115 P.3d at 623. The court also stated it had "considered" that "the quantity of drugs, as well as variety of drugs, was quite high." Although such a circumstance could arguably be "inherent in the jury verdict," *State v. Gomez*, 211 Ariz. 494, ¶ 36, 123 P.3d 1131, 1139 (2005), the court here apparently did not rely solely on the jury's findings that Jarrott had possessed and transported methamphetamine and cocaine, but also considered what the prosecutor described as the "Circle K for drugs" or "buffet of drugs" alleged to have been found in the vehicle. The court however granted a judgment of acquittal on Jarrott's convictions on the charges related to other drugs. Therefore we cannot say the presence of a "high"

variety of drugs was inherent in Jarrott's guilty verdicts. He therefore is entitled to resentencing on counts three and five.

Disposition

¶29 Jarrott's sentences on counts three and five are vacated and this case is remanded for resentencing on those counts. In all other respects his convictions and sentences are affirmed.

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

CONCURRING:

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

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