

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,)	2 CA-CR 2012-0011
)	DEPARTMENT B
Appellee,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
JOSE LEONEL PARRA-DEHARO,)	the Supreme Court
)	
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20100173002

Honorable Terry L. Chandler, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani, Joseph T. Maziarz, and
Nicholas Klingerman

Tucson
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K E L L Y, Judge.

¶1 Following two jury trials on severed counts of an indictment, appellant Jose Parra-Deharo was found guilty of conspiracy to commit armed robbery and/or burglary in

the first degree, and of sale of a dangerous drug (methamphetamine). The trial court sentenced him to concurrent prison terms of four and five years. In connection with the conviction for sale of a dangerous drug, he contends the court erred when it refused to give his requested jury instruction on the alleged lesser-included offense of facilitation and committed fundamental error when it failed sua sponte to instruct the jury on the lesser-included offenses of attempt to sell a dangerous drug. We affirm.

¶2 Rule 23.3, Ariz. R. Crim. P., provides that the trial court is required to instruct the jury on offenses that are “necessarily included in the offense charged.” *See State v. Valenzuela*, 194 Ariz. 404, ¶ 10, 984 P.2d 12, 14 (1999). An offense is a lesser-included offense of another offense if it is impossible to be convicted of the greater offense without having committed the lesser, or when the charging document actually describes the lesser offense, regardless of whether the conduct described is necessary for a conviction of the greater offense. *See State v. Robles*, 213 Ariz. 268, ¶ 5, 141 P.3d 748, 750-51 (App. 2006). “A lesser-included offense, however, is one composed of fewer elements than the greater offense, not merely one having a lesser penalty.” *State v. Woods*, 168 Ariz. 543, 545, 815 P.2d 912, 914 (App. 1991).

¶3 Before trial, Parra-Deharo filed a motion in which he conceded facilitation was not a necessarily included offense of sale of a dangerous drug because the indictment did not expressly base his liability on an accomplice theory, but he insisted he was entitled to a facilitation instruction nevertheless because he anticipated accomplice liability would be the state’s theory of the case at trial. The state objected to the

instruction, relying on *State v. Politte*, 136 Ariz. 117, 664 P.2d 661 (App. 1982), and the trial court agreed, refusing to give it.

¶4 Parra-Deharo first argues the trial court violated his right to a fair trial, which is guaranteed by the state and federal constitutions and includes the right to a jury instruction on any theory that is reasonably supported by the evidence, when the court refused to give the jury a facilitation instruction. He asserts that the offense of facilitation under A.R.S. § 13-1004(A) was a lesser-included offense of sale of a dangerous drug and that without an instruction on that offense, “the jury instructions did not accurately state the law.”¹ He argues that because the state presented an accomplice theory of liability, pursuant to A.R.S. §§ 13-301 through 13-304, facilitation “would have to be a lesser-included of the Sale or Transfer of a Dangerous Drug.”

¶5 In *Politte*, this court found the trial court correctly had refused to instruct the jury on facilitation, which the defendant had argued was a lesser-included offense of sale of a narcotic drug. 136 Ariz. at 121, 664 P.2d at 665. We concluded, “Facilitation is not a necessary included offense of unlawful sale since the sale can be committed without necessarily committing facilitation.” *Id.* We observed that even though there were facts that “may have supported a conviction for facilitation,” the defendant had not been charged with committing that offense. *Id.* Rather, the defendant was charged with

¹Parra-Deharo’s citation of and reliance on *State v. Hutto*, Nos. 1 CA-CR 08-0528, 1 CA-CR 08-0533 (consolidated) (memorandum decision filed Aug. 13, 2009) was improper. See Ariz. R. Sup. Ct. 111(c). That case is an unpublished decision and has no precedential value. *Id.*

unlawful sale of a narcotic based on the state’s theory that he had aided and abetted the commission of the crime. *Id.*

¶6 We added that even though the evidence may have supported that the defendant had committed an uncharged offense, he was not entitled to an instruction on that offense. *Id.*; *see also State v. Gooch*, 139 Ariz. 365, 366-67, 678 P.2d 946, 947-48 (1984) (finding facilitation not a lesser-included offense of second-degree murder, despite fact that state’s case was based on accomplice liability; concluding, “[e]ven though appellant *could* have been prosecuted for facilitation, that possibility does not affect . . . whether the instruction is proper”); *State v. Garcia*, 176 Ariz. 231, 233, 860 P.2d 498, 500 (App. 1993) (finding facilitation not lesser-included offense of aggravated assault and defendant not entitled to instruction despite state’s theory of accomplice liability).

¶7 *Politte*, *Gooch*, and *Garcia*, which Parra-Deharo acknowledges, are not, as he suggests, distinguishable based on factual differences between those cases and this one. The legal principles for which those cases stand remain the same regardless of the factual distinctions—facilitation is not a lesser-included offense.

¶8 Similarly, in *Woods*, this court rejected an argument much like the argument Parra-Deharo is making here. 168 Ariz. at 545, 815 P.2d at 914. We stated, “At best, defendant established that the offense of solicitation to sell a narcotic drug is the same offense as sale of a narcotic drug by an accomplice. A lesser-included offense, however, is one composed of fewer elements than the greater offense, not merely one having a lesser penalty.” *Id.* Thus, as in *Woods*, the mere fact that Parra-Deharo could have been

charged with another offense did not mean he was entitled to an instruction on that offense. “[D]etermining which offenses should be charged is a matter of prosecutorial discretion.” *Id.* Parra-Deharo’s due process rights were not violated and the trial court did not err in refusing to instruct the jury on the offense of facilitation.

¶9 Parra-Deharo next argues the trial court erred by failing sua sponte to instruct the jury on attempt to commit sale of a dangerous drug as a lesser-included offense of sale or transfer of a dangerous drug. He maintains that since he was charged with intentionally selling, transporting or transferring a dangerous drug, in violation of A.R.S. § 13-3408(A)(7), “[i]t is not possible to do so intentionally without attempting to do so.” We conclude the court did not commit fundamental error by failing sua sponte to instruct the jury on attempt to commit sale of a dangerous drug as a lesser-included offense of sale of a dangerous drug. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005) (defendant forfeits right to seek relief for all but fundamental, prejudicial error by failing to raise issue in trial court); *see State v. Gendron*, 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991) (failure to request jury instruction waives issue, unless error fundamental). Fundamental error is error that goes to the foundation of the defendant’s case or takes “a right essential to his defense” in such a way that the defendant “could not possibly have received a fair trial.” *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). Parra-Deharo has not established fundamental and prejudicial error occurred here because the evidence demonstrated the offense was completed. Having found sufficient

evidence of the completed offense, the jury could not reasonably have found the state had only presented sufficient evidence to support a guilty verdict on the lesser offense. *See State v. Wall*, 212 Ariz. 1, ¶ 18, 126 P.3d 148, 151 (2006).

¶10 We affirm the convictions and the sentences imposed.

/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