IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

PAULA MARIE HUFF,
Appellant.

No. 2 CA-CR 2013-0482
Filed July 28, 2014

Appeal from the Superior Court in Pima County
No. CR20130470001
The Honorable Jane L. Eikleberry, Judge

AFFIRMED

COUNSEL

Thomas C. Horne, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Amy Pignatella Cain, Assistant Attorney General, Tucson
Counsel for Appellee

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By Paul Gattone
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MEMORANDUM DECISION

Presiding Judge Kelly authored the decision of the Court, in which Judge Howard and Judge Vásquez concurred.

K E L L Y, Presiding Judge:

¶1 Following a jury trial, appellant Paula Huff was convicted of production of marijuana and possession of drug paraphernalia. The trial court sentenced her to concurrent, substantially mitigated prison terms, the longer of which was one year. On appeal, Huff argues the court erred by giving an erroneous jury instruction on the amount of marijuana a registered qualifying patient under the Arizona Medical Marijuana Act (AMMA) can possess, resulting in fundamental, prejudicial error. *See* A.R.S. §§ 36-2801 through 36-2819. For the reasons that follow, we affirm.

¶2 We view the facts and the inferences drawn from the facts in the light most favorable to sustaining the jury's verdicts. *State v. Miles*, 211 Ariz. 475, ¶ 2, 123 P.3d 669, 670 (App. 2005). In January 2013, pursuant to a search warrant, officers removed eighteen marijuana plants weighing 8.3 pounds[1] from an unlocked, unsecured room in Huff's residence. Huff, who represented herself at trial, is a registered qualifying patient authorized to cultivate marijuana.[2]

¶3 On appeal, Huff claims the trial court committed fundamental error by erroneously instructing the jury as to the amount of marijuana a registered qualifying patient is entitled to

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[1]The state did not introduce evidence regarding the amount of usable marijuana Huff possessed. *See* A.R.S. § 36-2801(15).

[2]Although the parties stipulated that Huff possessed a valid registry identification card, they did not stipulate that it provided she was permitted to cultivate marijuana. However, it does not appear this fact was disputed at trial.

possess and that the faulty instruction caused her prejudice. As Huff recognizes, she did not object to the instruction below, and we therefore review only for fundamental, prejudicial error. *See State v. Moody*, 208 Ariz. 424, ¶ 189, 94 P.3d 1119, 1161 (2004) (by failing to object to jury instruction, defendant waives all but fundamental error); *see also State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005) (by failing to object to error in trial court, defendant forfeits right to assert all but fundamental error and must establish error was prejudicial). To prevail on this claim, Huff was required to establish that error occurred and that the error "goes to the foundation of [her] case, takes away a right that is essential to [her] defense, and is of such magnitude that [s]he could not have received a fair trial." *Henderson*, 210 Ariz. 561, ¶¶ 23-24, 115 P.3d at 608. A defendant will rarely obtain appellate relief on the basis of a defective jury instruction to which he or she did not object in the trial court. *State v. Gomez*, 211 Ariz. 494, ¶ 20, 123 P.3d 1131, 1136 (2005).

¶4 Pursuant to A.R.S. § 36-2811(A)(1)(a), (b), there is a presumption that a registered qualifying patient "is engaged in the medical use of marijuana" if he or she "[i]s in possession of a registry identification card" and "an amount of marijuana that does not exceed the allowable amount of marijuana." Section 36-2801(1)(a)(i), (ii), A.R.S., defines an allowable amount of marijuana as 2.5 ounces of usable marijuana and, if the patient is authorized to cultivate marijuana, twelve marijuana plants. Here, the relevant jury instruction given by the trial court incorrectly included the word *or* rather than *and*:

> [I]f a person is a cardholder of a valid marijuana card, there is a presumption that he or she is engaged in the medical use of marijuana if the person is in possession of an allowable amount of two and ½ ounces or less of usable marijuana, *or* 12 marijuana plants or less, contained in an enclosed, locked facility.

(Emphasis added.)

¶5 Huff argues the primary issue at trial was whether she had exceeded the amount of marijuana permitted for a registered qualifying patient, and she maintains, "[b]y misstating the law on how much marijuana [she] could possess, the trial judge's error went to the foundation of [her] case," resulting in fundamental, prejudicial error. She also asserts the state's failure to retain the root balls of the marijuana plants confiscated from her residence made it "impossible to determine the exact number of plants she actually was growing," thereby rendering the jury unable to properly determine if she had exceeded the allowable amount of marijuana under the AMMA. Because the jury instruction was faulty, a fact the state concedes, we first determine whether "the error was fundamental in light of the facts and circumstances of this case," mindful that "'the same error may be fundamental in one case but not in another.'" *State v. James*, 231 Ariz. 490, ¶ 13, 297 P.3d 182, 185 (App. 2013), *quoting State v. Bible*, 175 Ariz. 549, 572, 858 P.2d 1152, 1175 (1993).

¶6 The state acknowledges the instruction was incorrect, but argues the error was neither fundamental nor prejudicial. We agree. Although the instruction incorrectly used *or* rather than *and* to establish the amount of marijuana Huff was permitted to possess, because the amount of usable marijuana was not an issue at trial, no fundamental error occurred. *Cf. State v. Finch*, 202 Ariz. 410, ¶ 20, 46 P.3d 421, 426 (2002) (failure to give jury instruction on claim not at issue at trial not fundamental error); *State v. Van Adams*, 194 Ariz. 408, ¶ 18, 984 P.2d 16, 23 (1999) (failure to instruct jury on premeditation when defense based on total innocence or mistaken identity not fundamental error).

¶7 During the discussion of the final jury instructions, Huff told the trial court she "had no usable [marijuana] whatsoever." Nor does the record establish that the amount of usable marijuana was an issue at any point during the trial.[3] Instead, the only issue

[3]Although Huff inconsistently argues on appeal that "the State did not introduce evidence of how many ounces of usable marijuana [she] possessed," and that "[t]he State introduced evidence

related to the allowable amount of marijuana concerned the number of plants found in Huff's residence. At trial, Huff told the court, outside the presence of the jury, that she wanted to bring in "the root balls [of the confiscated marijuana plants] so we can verify how many [plants] there are," explaining that "the plant is defined by the root system." She also told the court that she believed she had eleven plants, but without the root balls, she could not "determine how many are there." And, one of the officers provided detailed testimony to the jury describing how the police package marijuana plants confiscated from a cultivating operation like Huff's, stating that the root balls in this case had not been saved. However, there also was testimony that many of the plants the police had confiscated from Huff's residence were "intact with the leaves and the stems" and that even the smaller, less mature plants "had a root system."

¶8 In its opening statement, the state did not mention a usable amount of marijuana, but instead argued that Huff had grown eighteen marijuana plants, which was "too many plants," and that they had not been found in a closed, locked facility as required by the AMMA. *See* § 36-2801(1)(a)(ii). During closing argument, the state reminded the jury that three officers had testified they had retrieved eighteen plants from Huff's residence, referring to a usable quantity only in a general manner and in relation to the plants, stating that Huff had "[e]ighteen plants that if they reach maturity could produce anywhere from nine pounds to 18 pounds of usable marijuana." And, in her closing argument, Huff did not mention the state's failure to prove an amount of usable marijuana, rather, she referred only to the state's having "disposed of the root balls" and that there was "no proof" that the room with the marijuana was unlocked.

¶9 Accordingly, because the amount of usable marijuana was not a part of Huff's defense or an issue at trial, Huff has not established that the incorrect instruction went to the "foundation of [her] case," took "away a right that [was] essential to [her] defense,

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regarding the amount of usable marijuana . . . [she] possessed," the record supports the first position.

and [was] of such magnitude that [s]he could not have received a fair trial." *Henderson*, 210 Ariz. 561, ¶ 24, 115 P.3d at 608. Therefore, the erroneous jury instruction did not constitute fundamental error.

¶10 In any event, Huff did not establish she was prejudiced by the faulty jury instruction, *id.* ¶ 20, or "that a reasonable jury 'could have reached a different result' had the jury been properly instructed," *James*, 231 Ariz. 490, ¶ 15, 297 P.3d at 186, *quoting Henderson*, 210 Ariz. 561, ¶ 27, 115 P.3d at 609. The evidence at trial showed that Huff had possessed eighteen marijuana plants, in excess of the allowable amount permitted under § 36-2801(1)(a)(ii). And, to the extent Huff claims she presented conflicting evidence regarding the number of marijuana plants, it is for the jury to weigh the evidence, resolve the conflicts in the evidence, and assess the credibility of witnesses. *State v. Manzanedo*, 210 Ariz. 292, ¶ 3, 110 P.3d 1026, 1027 (App. 2005). Additionally, the state's evidence that the plants were not "contained in an enclosed, locked facility," as § 36-2801(1)(a)(ii) requires, essentially was uncontested. Accordingly, because a reasonable, properly instructed jury would have found that Huff had violated the AMMA, we cannot reasonably conclude she suffered prejudice because of the erroneous instruction.

¶11 For the reasons set forth above, we affirm Huff's convictions and sentences.