

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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JUL 29 2011

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2010-0321
	)	DEPARTMENT B
Appellee,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
ELVIA VARELA RUELAS,	)	the Supreme Court
	)	
Appellant.	)	
_____	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20093852001

Honorable Christopher C. Browning, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General  
By Kent E. Cattani and Kathryn A. Damstra

Tucson  
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender  
By Robb P. Holmes

Tucson  
Attorneys for Appellant

V Á S Q U E Z, Presiding Judge.

¶1 Appellant Elvia Ruelas was convicted after a jury trial of two counts of sale or transfer of a narcotic drug. The trial court imposed concurrent, mitigated four-year terms of incarceration. On appeal, Ruelas contends the court erred when it refused to instruct the jury on the offense of manufacture or distribution of an imitation controlled substance. We affirm.

¶2 On two different occasions in 2009, Ruelas sold cocaine to an undercover narcotics officer. The first purchase consisted of cocaine packaged in “four little clear baggies,” one of which the undercover officer opened and placed in a “ziplock” baggie for ease of examination. The second purchase consisted of cocaine packaged in “a single baggie.” Ruelas was charged with two counts of selling or transferring a narcotic drug.

¶3 At trial, Tucson Police Department criminalist Quentin Peterson testified he had followed laboratory guidelines when he individually tested the substance in all five baggies. The tests, which revealed the substance was cocaine, included a water solubility test and a more sensitive test using gas chromatograph and slash mass spectral analyzer (GCMS). Peterson also testified that when necessary he used “needle nose pliers” to untie baggies that were difficult to open. He explained that, when the tip of the pliers punctured the baggies, he would clean any drug residue off the pliers before using them to open another sample. Peterson also testified that, although a light amount of residue from another sample would not impact the GCMS test results, “a significant amount . . . [a]bout a sesame [seed] size sample,” might do so. Although Peterson testified he had used the pliers on some of the baggies in this case, he was not asked, nor did he testify whether he had punctured any of the baggies here. At trial, Ruelas did not dispute the

sales had taken place, but instead asserted “[t]he testing [of the cocaine] was foundationally fatally flawed,” claiming the cocaine had been tainted by Peterson’s contaminated pliers, and the state thus had failed to prove she had sold cocaine to the undercover officer.

¶4 Ruelas requested a lesser-included jury instruction for manufacture or distribution of an imitation controlled substance. *See* A.R.S. § 13-3453(A) (unlawful for person to manufacture, distribute or possess with intent to distribute an imitation controlled substance). The trial court denied the request, finding that distribution of an imitation controlled substance is not a lesser-included offense of the charged offense of sale or transfer of a narcotic drug because it contains distinct elements not found in the greater offense, specifically, intent to distribute an imitation controlled substance. *See* §§ 13-3453(A), 13-3408(A)(7). Notably, the court also found there was no evidence Ruelas had intended to distribute an imitation controlled substance, and if the jury ultimately found Peterson had contaminated the samples with his pliers, it might acquit Ruelas altogether.

¶5 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). A court must instruct the jury on a lesser-included offense if the evidence supports the instruction. *State v. Vickers*, 159 Ariz. 532, 542, 768 P.2d 1177, 1187 (1989); *see also* Ariz. R. Crim. P. 23.3 (trial court must instruct jury on all offenses “necessarily included in the offense charged”). “[A]n offense is ‘necessarily included,’ and so requires that a jury instruction be given, only when it is lesser included *and* the

evidence is sufficient to support giving the instruction.” *State v. Wall*, 212 Ariz. 1, ¶ 14, 126 P.3d 148, 150 (2006).

¶6 Whether an offense is a lesser-included offense is a question of law we review de novo. *State v. Cheramie*, 218 Ariz. 447, ¶¶ 6-8, 189 P.3d 374, 375 (2008). A lesser-included offense is one “composed solely of some but not all of the elements of the greater crime so that it is impossible to have committed the crime charged without having committed the lesser one.” *State v. Celaya*, 135 Ariz. 248, 251, 660 P.2d 849, 852 (1983). Pursuant to § 13-3453(A), it is “unlawful for a person to manufacture, distribute or possess with intent to distribute an imitation controlled substance,” whereas § 13-3408(A)(7), the charged offense, provides that a “person shall not knowingly . . . sell . . . or offer to sell . . . a narcotic drug.” The offense of distributing an imitation controlled substance is composed of entirely different elements than the offense of sale or transfer of a narcotic drug; specifically, the required mens rea (“intent to distribute” versus “knowingly” selling) and the actual substances involved (imitation substance versus cocaine, in this instance) differ between the two offenses. See §§ 13-3451(4) (defining imitation controlled substance as a “counterfeit preparation”) and 13-3401(5), 20(z) (defining cocaine and narcotic drugs). Not only is the former not a lesser-included offense of the latter, but they are distinct offenses. Moreover, because Ruelas was not charged with unlawful distribution of an imitation controlled substance, she was not entitled to a jury instruction on that offense. See *State v. Gonzalez*, 221 Ariz. 82, ¶ 8, 210 P.3d 1253, 1255 (App. 2009) (defendant not entitled to jury instruction on uncharged

offense that does not qualify as lesser-included offense, even if he might have been charged with or convicted of offense).

¶7 Ruelas further contends that, “[w]hile the court may have been correct in its assessment that [manufacture or distribution of an imitation controlled substance] is not a lesser-included offense,” she nonetheless was entitled to the instruction because her defense theory at trial was that “she sold the undercover officer an imitation controlled substance, and that the crime lab contaminated the sample with cocaine from another case during testing.” She argues “it was irrelevant whether the proffered instruction was a lesser offense of the charged offense, because that was not the reason she sought the instruction.” However, having expressly asked the trial court, in writing and orally, to give the proffered instruction on the ground it was a lesser-included offense of the charged offenses, Ruelas cannot argue on appeal that the court’s consideration of the instruction on that very ground was “irrelevant.” And the court found there was no evidence Ruelas had intended “to manufacture, imitate or possess a[n] imitation controlled substance”; Peterson had not used pliers on all of the drug samples; and, it was for the jury to decide whether Peterson had cleaned the pliers if contamination had, in fact, occurred. Moreover, Ruelas has not directed us to anything in the record showing that defense counsel expressly argued to the jury that Ruelas had sold or intended to sell an imitation substance to the undercover officer. *Cf. State v. Gomez*, 211 Ariz. 494, ¶ 30, 123 P.3d 1131, 1138 (2005) (defendant entitled to instruction on any theory reasonably supported by evidence).

¶8 For all of the reasons stated above, the trial court did not err in rejecting the requested lesser-included offense instruction. The convictions and sentences imposed are affirmed.

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

CONCURRING:

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

/s/ Peter J. Eckerstrom  
PETER J. ECKERSTROM, Judge