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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THE STATE OF ARIZONA, Appellee, v. ANTONIO DIAZ OTERO, Appellant.	2 CA-CR 2008-0161 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200700549

Honorable James L. Conlogue, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Jonathan Bass — Tucson
Attorneys for Appellee

Gail Gianasi Natale — Phoenix
Attorney for Appellant

B R A M M E R, Judge.

¶1 After a jury trial, appellant Antonio Diaz Otero was convicted of possessing a dangerous drug (methamphetamine) for sale, possessing a narcotic drug (hydrocodone) for sale, and possessing drug paraphernalia. The trial court sentenced him to three consecutive, mitigated prison terms totaling 9.5 years. On appeal, he contends the court erred in refusing to instruct the jury that simple possession was a lesser-included offense of possession for sale and in imposing consecutive sentences for what he claims was essentially a single act.

¶2 Viewed in the light most favorable to sustaining Otero's convictions, *see State v. Mangum*, 214 Ariz. 165, ¶ 3, 150 P.3d 252, 253 (App. 2007), the evidence established that, in May 2007, a Department of Public Safety officer stopped a vehicle he had observed speeding on State Route 90 in Cochise County. The driver of the car was a female approximately nineteen to twenty years old; Otero and two minor females were passengers. As the officer approached the vehicle on foot to speak with the driver, he smelled "a strong odor of burnt marijuana" emanating from the car.

¶3 After a second officer arrived on the scene to assist, the first officer searched the car and found a black bag on the floor in front of the front passenger seat where Otero had been sitting. Inside the bag were a glass pipe with burnt drug residue inside it, a scale, two bags containing methamphetamine, a small white bag containing nineteen pills that later proved to be hydrocodone, and a sizeable amount of money—"at least $2,000"—"next to the

bags of methamphetamine . . . stashed in a plastic bag in one hundred dollar[] stacks."[1] The black bag also contained documents—including an Arizona Motor Vehicle Division application for registration and title, a certificate of title, and a lien release—bearing Otero's name and a Tucson address.

¶4 In the trunk of the car, the second officer found a smaller black bag or case containing two spoons with what appeared to be methamphetamine residue on them; an assortment of smaller, plastic "jeweler's bags" or "bindle bags" used to package drugs for individual sale; and "a bong." Otero denied that the larger black bag was his but claimed ownership of the stacks of money inside the bag.

¶5 Otero first contends the trial court erred as a matter of law by refusing to instruct the jury that simple possession was a lesser-included offense of the possession-for-sale offenses with which Otero was charged. He contends the trial court denied his requested instruction based solely on this court's later-vacated decision in *State v. Cheramie*, 217 Ariz. 212, 171 P.3d 1253 (App. 2007) (*Cheramie I*). We had held in *Cheramie I* that possession of a dangerous drug was not a lesser-included offense of transporting a dangerous drug for sale because the former offense contained a judicially engrafted element—that the amount of the drug possessed must be a usable quantity—that the offense of transportation for sale did not contain. *Id.* ¶ 7. On review of our decision, the Arizona Supreme Court vacated our

[1]One of the officers testified that the total amount of money recovered was $2,877.37, of which "the lion['s] share" was found in the black bag and "a little bit" on "Otero's person."

opinion, clarifying that the offense of simple possession of a dangerous drug includes no usable-quantity element and holding that such possession is indeed a lesser-included offense of transportation of a dangerous drug for sale. *State v. Cheramie*, 218 Ariz. 447, ¶¶ 21-22, 189 P.3d 374, 378 (2008) (*Cheramie II*). Because the trial court based its refusal to give a lesser-included-offense instruction here on the holding in *Cheramie I* that was later vacated, Otero contends he is entitled to a new trial.

¶6 We review for an abuse of discretion a trial court's denial of a defendant's requested instruction on a lesser-included offense. *State v. Johnson*, 212 Ariz. 425, ¶ 15, 133 P.3d 735, 741 (2006). Although Otero is correct that simple possession of a narcotic drug or dangerous drug is a lesser-included offense of possessing either such substance for sale, *see Gray v. Irwin*, 195 Ariz. 273, ¶ 12, 987 P.2d 759, 762 (App. 1999); *State v. Moroyoqui*, 125 Ariz. 562, 564, 611 P.2d 566, 568 (App. 1980), a trial court is only required to give a lesser-included-offense instruction if the lesser offense is also "necessarily included"—that is, if the evidence in the case would permit a reasonable jury to "find that only the elements of [the] lesser offense have been proved." *State v. Wall*, 212 Ariz. 1, ¶ 14, 126 P.3d 148, 150 (2006); *see also* Ariz. R. Crim. P. 23.3. If the evidence clearly proves the greater offense and would not permit the jury to find only the lesser-included offense proven, then giving the instruction is not required. *See State v. Lara*, 183 Ariz. 233, 235, 902 P.2d 1337, 1339 (1995).

¶7 Abundant evidence supported the jury's finding that the purpose for which Otero had possessed the methamphetamine and hydrocodone in this case was for sale. A Sierra Vista police officer with years of experience investigating drug offenses testified that the 5.3 grams of methamphetamine in Otero's possession were of a type and consistency and in a quantity consistent with sale and inconsistent with personal use; that the nineteen hydrocodone pills Otero possessed had a street value of $50 to $100 each; and that the spoons, scale, smaller plastic bags, and hundred-dollar stacks of cash Otero possessed were all consistent with trafficking in drugs and inconsistent with possession for personal use. The defense called no witnesses, and the state's evidence was essentially uncontroverted that the quantity of drugs and the nature of the paraphernalia Otero possessed indicated possession for sale and not personal use. In short, based on the evidence presented, the jury could not reasonably have found Otero had possessed the items without also finding that he had possessed them for the purpose of selling them.

¶8 Regardless of the trial court's stated reasons for its ruling, we will affirm a ruling if it is legally correct for any reason. *See State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984); *State v. Flores*, 218 Ariz. 407, n.14, 188 P.3d 706, 715 n.14 (App. 2008). Because the evidence in this case did not reasonably support a finding that Otero's possession was for personal use, it was neither error nor an abuse of discretion for the trial court to refuse to instruct the jury on simple possession as a lesser-included offense of possession for sale.

¶9 In his second issue, Otero asserts the trial court abused its discretion by imposing three consecutive sentences for what he contends "essentially was a single act" for purposes of A.R.S. § 13-116.[2] We review de novo the legal question whether a trial court's imposition of consecutive sentences violated § 13-116. *State v. Urquidez*, 213 Ariz. 50, ¶ 6, 138 P.3d 1177, 1179 (App. 2006).

¶10 To determine whether criminal offenses constitute the same or separate acts for purposes of § 13-116, we do not compare the elements of the offenses but focus instead on "'the facts of the transaction.'" *State v. Price*, 218 Ariz. 311, ¶ 14, 183 P.3d 1279, 1283 (App. 2008), *quoting State v. Siddle*, 202 Ariz. 512, ¶ 17, 47 P.3d 1150, 1155 (App. 2002); *see also State v. Gordon*, 161 Ariz. 308, 313 n.5, 778 P.2d 1204, 1209 n.5 (1989). Plainly, the facts of these three transactions are distinct. Otero could have possessed either methamphetamine or hydrocodone or drug paraphernalia without possessing either of the other two items; subtracting any one of the three would have had no effect on either of the other two offenses. Despite his simultaneous commission of the crimes, Otero's possession of a narcotic drug, a dangerous drug, and drug paraphernalia constituted three discrete

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[2]Section 13-116, entitled "Double punishment," provides: "An act or omission 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."

Section 13-711, A.R.S. (formerly § 13-708, *see* 2008 Ariz. Sess. Laws, ch. 301, § 27), provides in pertinent part that "multiple sentences of imprisonment . . . imposed on a person at the same time . . . shall run consecutively unless the court expressly directs otherwise . . . ."

offenses. Thus, the trial court neither erred nor abused its discretion in ordering his sentences for these separate offenses served consecutively.

¶11 Because neither issue raised on appeal warrants reversal, we affirm Otero's convictions and the sentences imposed.

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J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

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GARYE L. VÁSQUEZ, Judge

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JOSEPH W. HOWARD, Chief Judge