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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| THE STATE OF ARIZONA,<br><br>Appellee,<br><br>v.<br><br>JESSICA NOEL DEPINA,<br><br>Appellant. | 2 CA-CR 2008-0210<br>DEPARTMENT A<br><br>MEMORANDUM DECISION<br>Not for Publication<br>Rule 111, Rules of<br>the Supreme Court |

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20064814

Honorable Hector E. Campoy, Judge

AFFIRMED IN PART; VACATED IN PART

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Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Joseph L. Parkhurst
Tucson
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Scott A. Martin
Tucson
Attorneys for Appellant

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H O W A R D, Chief Judge.

**¶1** Following a jury trial, appellant Jessica DePina was convicted of possession of marijuana for sale, a class three felony, and transportation of marijuana for sale, a class two felony. The trial court sentenced her to concurrent, substantially mitigated and mitigated prison terms, the longer of which was three years. On appeal, DePina contends the oral instruction the court gave to the jury on accomplice liability constituted fundamental error. We vacate her conviction and sentence for possession of marijuana for sale but otherwise affirm for the reasons set forth below.

**¶2** In December 2006, DePina and codefendant Chris Flores were arrested after they left a border patrol checkpoint northeast of Nogales, Arizona, without the border patrol agent's consent. Once they were apprehended, Flores, who had been driving the vehicle, which was registered to DePina's mother, consented to a search of the trunk of the vehicle, which contained 118 pounds of marijuana. At trial, DePina testified she and Flores had never discussed marijuana or transporting drugs and that she did not know anything about the marijuana in the car. DePina nonetheless admitted at trial that she had previously told a detective, "'I knew that we were going to get some [drugs] and transfer it somewhere, but I [did not] know where we were going, I [did not] know whose house we picked it up at. I had no idea where I was. And I didn't know how much it was going to be.'" Flores, who pled guilty to possession of marijuana, testified that DePina did not have anything to do with the marijuana, that she knew nothing about it, and that he had taken advantage of her.

**¶3** On appeal, DePina claims the trial court erred by giving the jury the following oral instruction on accomplice liability:

> Accomplice means a person other than a peace officer acting in an official capacity within the scope of authority *and* in the line of duty and with the intent to promote or facilitate the commission of an offense: One, solicits or commands another person to commit an offense, or two, aids, counsels, agrees to aid or attempts to aid another person in planning or committing the offense, or three, provides means or opportunity to another person to commit an offense. The law makes no distinction between a person who directly commits a crime and a person who is an accomplice.

(Emphasis added.) DePina does not dispute that the written instruction the court gave to the jury[1] was correct or complied with the applicable version of A.R.S. § 13-301.[2] She asserts,

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[1]The written instruction stated as follows:

> "Accomplice" means a person, other than a peace officer acting in an official capacity within the scope of authority and in the line of duty, who, with the intent to promote or facilitate the commission of an offense,
>
> 1. Solicits or commands another person to commit the offense; or
>
> 2. Aids, counsels, agrees to aid or attempts to aid another person in planning or committing the offense; or
>
> 3. Provides means or opportunity to another person to commit the offense.
>
> The law makes no distinction between a person who directly commits a crime and a person who is an accomplice.

[2]The version of A.R.S. § 13-301 in effect when DePina committed the offenses provided:

however, that the oral instruction improperly relieved the state of its burden of proving she intended to promote or facilitate the offense. She contends that: (1) by eliminating the comma that should have followed the word "duty," which was intended to offset the exception for peace officers, and (2) by replacing the comma with the word "and" in the oral instruction, the court improperly removed the intent element from the accomplice instruction. DePina does not dispute that the evidence showed she had "aided Flores and provided him the means to commit the offense of transporting marijuana for sale." Rather, she claims the only issue in question is whether she intended to do so.

**¶4** We review de novo whether a jury instruction properly states the law. *State v. Orendain*, 188 Ariz. 54, 56, 932 P.2d 1325, 1327 (1997). DePina has waived all but fundamental, prejudicial error by failing to object to the instruction at trial. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). Fundamental error is "'error

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> "[A]ccomplice" means a person, other than a peace officer acting in his official capacity within the scope of his authority and in the line of duty, who with the intent to promote or facilitate the commission of an offense:
>
> 1. Solicits or commands another person to commit the offense; or
>
> 2. Aids, counsels, agrees to aid or attempts to aid another person in planning or committing the offense.
>
> 3. Provides means or opportunity to another person to commit the offense.

*See* 1977 Ariz. Sess. Laws, ch. 142, § 43.

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 (1984). To obtain relief, DePina must demonstrate that fundamental, prejudicial error occurred, a burden she claims she has sustained. *See id.* ¶ 20.

**¶5** Even assuming without deciding that the instruction given to the jury was an incorrect statement of the law, we reject DePina's suggestion that it constituted fundamental error. In defense counsel's closing argument, she correctly informed the jury that an accomplice must have the "intent to promote or facilitate the commission of an offense." *See State v. Bruggeman*, 161 Ariz. 508, 510, 779 P.2d 823, 825 (App. 1989) (we do not evaluate jury instructions out of context; attorney's closing argument can clarify an instruction not drafted as artfully as it should have been). More importantly, the trial court provided each juror with a jury book that contained a copy of the written instructions, the accuracy of which DePina does not dispute. The court explained to the jurors that they did not need to memorize anything it told them, as they would have the jury book to "take . . . back into the jury room" during deliberations. When viewed in this context, DePina has not sustained her burden of showing that any possible confusion in the court's oral instruction was fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607.

**¶6** In its answering brief, the state notes that possession of marijuana is a lesser-included offense of transportation of marijuana for sale when the same marijuana constitutes

the evidence for both offenses, an argument DePina did not raise in her opening brief. In *State v. Chabolla-Hinojosa*, 192 Ariz. 360, ¶¶ 13, 21, 965 P.2d 94, 97, 99 (App. 1998), this court held that, when based on the same transaction, possession of marijuana for sale is a lesser-included offense of transportation of marijuana for sale and, therefore, conviction of both offenses violates double jeopardy principles. Double jeopardy violations constitute fundamental error. *State v. Siddle*, 202 Ariz. 512, n.2, 47 P.3d 1150, 1153 n.2 (App. 2002). We review de novo whether a defendant's double jeopardy rights have been violated. *State v. Brown*, 217 Ariz. 617, ¶ 12, 177 P.3d 878, 882 (App. 2008). Because both convictions here were based on the same transaction, the state's candid notation of the error is correct. We must, therefore, vacate DePina's conviction and sentence for possession of marijuana for sale. *See Chabolla-Hinojosa*, 192 Ariz. 360, ¶ 21, 965 P.2d at 99 (when defendant convicted of lesser-included offense in violation of double jeopardy, lesser offense vacated).

**¶7** We affirm DePina's conviction and sentence for transportation of marijuana for sale. However, because her dual convictions violate the protection against double jeopardy, we vacate her conviction and sentence for possession of marijuana for sale.

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JOSEPH W. HOWARD, Chief Judge

CONCURRING:

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PHILIP G. ESPINOSA, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge