

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



DIVISION ONE  
FILED: 1/17/2013  
RUTH A. WILLINGHAM,  
CLERK  
BY: mjt

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) No. 1 CA-CR 12-0059  
)  
Appellee, ) DEPARTMENT E  
)  
v. ) **MEMORANDUM DECISION**  
)  
KEVAN MIKAEL DILES, ) (Not for Publication -  
) Rule 111, Rules of the  
Appellant. ) Arizona Supreme Court)  
)

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Appeal from the Superior Court in Maricopa County

Cause No. CR2011-116559-001

The Honorable Samuel A. Thumma, Judge

**AFFIRMED**

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Thomas C. Horne, Attorney General Phoenix  
By Kent E. Cattani, Chief Counsel  
Criminal Appeals/Capital Litigation Section  
And Alice Jones, Assistant Attorney General  
Attorneys for Appellee

Michael J. Dew Phoenix  
Attorney for Appellant

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**H A L L**, Judge

¶1 Kevan Mikael Diles (defendant) appeals his convictions and sentences of one count of possession of narcotic drugs for sale, a class 2 felony, one count of misconduct involving

weapons, a class 4 felony, and two counts of possession of drug paraphernalia, class 6 felonies. For the following reasons, we affirm.

#### **FACTUAL<sup>1</sup> AND PROCEDURAL BACKGROUND**

¶12 In April, 2011, defendant was indicted on four counts: Count 1, possession of narcotic drugs for sale, a class 2 felony; Count 2, misconduct involving weapons, a class 4 felony; Count 3, possession of drug paraphernalia by "unlawfully us[ing] or possess[ing] with intent to use baggies and/or scales and/or razor blades, drug paraphernalia, to pack, repack, store, contain, or conceal heroin, a narcotic drug" a class 6 felony; and Count 4, possession of drug paraphernalia by "unlawfully us[ing] or possess[ing] with intent to use syringes and/or foil, drug paraphernalia, to inject, ingest, inhale, or otherwise introduce into the human body heroin, a narcotic drug," a class 6 felony.

¶13 The following evidence was presented at the December 2011 trial. Phoenix Police Officer Peter Best testified that after receiving an anonymous tip about potential drug activity at the Studio 6 Hotel (the hotel), he and Officer Nicholas

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<sup>1</sup> We review the evidence and inferences drawn from the evidence in a light most favorable to upholding the verdicts. See *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

Barker approached defendant outside of defendant's hotel room, and asked for his identification. Defendant led Officers Best and Barker to his hotel room to retrieve his identification card, and Officer Best stated that "[i]n plain view from standing outside his motel room, we could see numerous syringes, a marijuana pipe, and a handgun sitting on a dresser next to a bed." Officers Best and Barker conducted a protective sweep of the room for their safety, and thereafter obtained a search warrant.

¶4 Officer Best testified that they also confiscated black tar heroin, \$724.05, balloons, razor blades, a purple tube used to inhale heroin, a spoon with a "large quantity of brown residue" on top and burn marks on the bottom, consistent with heating up heroin, and scales to weigh the heroin.<sup>2</sup> Officer Best also found a part of a needle, needle caps, aluminum foil, a lighter, syringes, and syringe caps, which he stated were consistent with heroin use.

¶5 Officer Best, who read defendant his *Miranda*<sup>3</sup> rights, testified that defendant stated he was addicted to heroin, used it approximately two to four times a day, and had been selling it to five people. Officer Best also said that he concluded

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<sup>2</sup> The scales, balloons, and razor blades were found in a safe in the hotel room.

<sup>3</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

based on his investigation that defendant owned the drugs found in the hotel room.

¶16 Faye Stump, a Phoenix Police Department crime laboratory employee who analyzes controlled substances, testified that she analyzed the substance confiscated in defendant's case and concluded that it was fourteen grams of heroin, a usable amount.

¶17 Defendant testified that he had not used drugs in the months preceding his arrest and had never sold drugs. He conceded that the police found heroin, drug needles, drug scales, balloons, tin foil, spoons, and syringes in his hotel room, which was registered in his name. Defendant, however, stated that the drugs and paraphernalia found in the hotel room belonged to his girlfriend.

¶18 The jury found defendant guilty as charged. The court sentenced defendant to concurrent prison terms of three years and three months for Count 1, one year and three months for Count 2, and five months each for Counts 3 and 4, with 121 days of presentence-incarceration credit for each count.

¶19 We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution, and Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1) (2003), 13-4031, and - 4033(A)(1) (2010).

## DISCUSSION

¶10 Defendant raises one issue, whether Counts 3 and 4 are multiplicitous, that he concedes we review for fundamental error. To obtain relief under fundamental-error review, Defendant has the burden to show that error occurred, the error was fundamental, and that he was prejudiced thereby. See *State v. Henderson*, 210 Ariz. 561, 567-68, ¶¶ 20-22, 115 P.3d 601, 607-08 (2005). Fundamental error is error that "goes to the foundation of his case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial." *Id.* at 568, ¶ 24, 115 P.3d at 608.

¶11 Multiplicity occurs when a charging document charges a "single offense in multiple counts [and] raises the potential for multiple punishments, which implicates double jeopardy." *State v. Powers*, 200 Ariz. 123, 125, ¶ 5, 23 P.3d 668, 670 (App. 2001); see also *State v. Barber*, 133 Ariz. 572, 576, 653 P.2d 29, 33 (App. 1982). In determining whether the counts are multiplicitous, we consider whether each count "requires proof of a fact that the other counts do not." *Barber*, 133 Ariz. at 576, 653 P.2d at 33.

¶12 Defendant was charged in Count 3 with possession of drug paraphernalia, due to "unlawfully us[ing] or possess[ing] with intent to use baggies, and/or scales and/or razor blades, drug paraphernalia, to pack, repack, store, contain, or conceal

heroin, a narcotic drug." See A.R.S. § 13-3415(A) (2010). Defendant was charged in Count 4 with possession of drug paraphernalia by "unlawfully us[ing] or possess[ing] with intent to use syringes and/or foil, drug paraphernalia, to inject, ingest, inhale, or otherwise introduce into the human body, heroin, a narcotic drug." See A.R.S. § 13-3415(A). Each offense as charged required proof of additional facts that the other count did not. Count 3 required proof that defendant used "baggies, and/or scales and/or razor blades, drug paraphernalia, to pack, repack, store, contain, or conceal heroin." The State presented evidence that defendant had scales and razor blades in his possession. Count 4 required proof that defendant used "syringes and/or foil, drug paraphernalia, to inject, ingest, inhale, or otherwise introduce into the human body, heroin." The State submitted evidence at trial that defendant had syringes and foil in his hotel room. The indictment was therefore not multiplicitous, and the superior court did not err, let alone fundamentally err.

**CONCLUSION**

¶13 For the foregoing reasons, we affirm.

\_\_\_\_\_/s/\_\_\_\_\_  
PHILIP HALL, Judge

CONCURRING:

\_\_\_\_\_/s/\_\_\_\_\_  
MARGARET H. DOWNIE, Presiding Judge

\_\_\_\_\_/s/\_\_\_\_\_  
MAURICE PORTLEY, Judge