DIVISION ONE
FILED: 4/11/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 12-0078
	)	
Appellee,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
MICHELLE MARIE LORE,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2011-102959-001

The Honorable Randall H. Warner, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Division
and Matthew H. Binford, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
by Jeffrey L. Force, Deputy Public Defender
Attorneys for Appellant

S W A N N, Judge

¶1 Michelle Marie Lore appeals her conviction on one count of possession or use of dangerous drugs. Lore argues that the trial court erred by permitting the state to proceed with a

duplicitous charge and by failing to sanction the state for a discovery violation. Lore also contends there was insufficient evidence to support the verdict and that her conviction violated the constitutional prohibition against double jeopardy. For reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 On January 4, 2010, a police officer stopped Lore for erratic driving. Lore exhibited signs and symptoms of methamphetamine use and was arrested. During a search of her vehicle incident to the arrest, the officer found a baggy containing methamphetamine inside Lore's purse, as well as other containers with methamphetamine residue. Lore consented to a blood draw. Analysis of her blood revealed it contained amphetamine and methamphetamine.

¶3 A criminal complaint was filed in Maricopa County Superior Court charging Lore with one count of having knowingly possessed or used a dangerous drug (methamphetamine), a class 4 felony, in violation of Arizona Revised Statutes (A.R.S.) section 13-3407(A)(1).[1] At the conclusion of the preliminary hearing on the charge, a magistrate found probable cause to hold Lore to stand trial. The state thereafter formally charged her by information with one count of possession or use of

[1] Absent material revisions after the relevant date, we cite a statute's current version.

methamphetamine, a dangerous drug, in violation of A.R.S. § 13-3407(A)(1).

¶4 At the conclusion of the trial, the jury found Lore guilty as charged. The trial court suspended sentencing and placed Lore on probation for a term of three years. Lore timely appeals. We have jurisdiction under A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

DISCUSSION

I. DUPLICITOUS CHARGE

¶5 Lore argues that the information filed by the state was duplicitous because it alleged possession and use in a single count. An indictment or information "is duplicitous if it charges more than one offense in the same count." *State v. Anderson*, 210 Ariz. 327, 335, ¶ 13, 111 P.3d 369, 377 (2005); *see also State v. Whitney*, 159 Ariz. 476, 480, 768 P.2d 638, 642 (1989) ("The law in Arizona requires that each offense must be charged in a separate count."); Ariz. R. Crim. P. 13.3(a) (requiring separate counts for each offense). Charging more than one offense in a single count is prohibited because it fails to provide adequate notice of the charge to be defended, presents the potential of a nonunanimous jury verdict, and makes the precise pleading of prior jeopardy impossible in the event of a future prosecution. *State v. Davis*, 206 Ariz. 377, 389, ¶ 54, 79 P.3d 64, 76 (2003). Whether a charge is duplicitous is a

question of law we review de novo. *State v. Ramsey*, 211 Ariz. 529, 532, ¶ 5, 124 P.3d 756, 759 (App. 2005).

¶6 The trial court denied Lore's motion challenging the information as duplicitous because it was untimely. Arizona Rule of Criminal Procedure 13.5(e) provides that "[n]o issue concerning a defect in the charging document shall be raised other than by a motion filed in accordance with Rule 16." Rule 16.1(b), in turn, requires that all motions be filed no later than twenty days before trial, unless otherwise authorized by the trial court. An untimely motion "shall be precluded, unless the basis therefor was not then known, and by the exercise of reasonable diligence could not then have been known, and the party raises it promptly upon learning of it." Ariz. R. Crim. P. 16.1(c).

¶7 Lore was on notice from the filing of the original complaint and information that the state was alleging that she committed the charged offense by having "knowingly possessed or used Methamphetamine." Because there was no reason Lore could not have filed her motion more than twenty days before trial, there was no error by the trial court in denying the untimely motion. *See State v. Montano*, 204 Ariz. 413, 419, ¶ 18, 65 P.3d 61, 67 (2003) (upholding denial of untimely motion to dismiss).

¶8 We further agree with the trial court that even if the motion had been timely, it is without merit. The various

criminal offenses that involve dangerous drugs[2] are set forth in A.R.S. § 13-3407(A). This statute states:

> A person shall not knowingly:
>
> 1. Possess or use a dangerous drug.
>
> 2. Possess a dangerous drug for sale.
>
> 3. Possess equipment or chemicals, or both, for the purpose of manufacturing a dangerous drug.
>
> 4. Manufacture a dangerous drug.
>
> 5. Administer a dangerous drug to another person.
>
> 6. Obtain or procure the administration of a dangerous drug by fraud, deceit, misrepresentation or subterfuge.
>
> 7. Transport for sale, import into this state or offer to transport for sale or import into this state, sell, transfer or offer to sell or transfer a dangerous drug.

¶9 Lore argues that the charge against her is duplicitous because it alleges both "possession" and "use" in one count. The flaw in her argument is that the terms "possess" and "use" set forth in A.R.S. § 13-3407(A)(1) are not two separate offenses, but rather two separate ways in which a person can commit the offense. "A count is not considered duplicitous merely because it charges alternate ways of violating the same statute." *State v. O'Brien*, 123 Ariz. 578, 583, 601 P.2d 341, 346 (App. 1979). If the legislature had intended "possess" and

[2] Methamphetamine is a dangerous drug. A.R.S. § 13-3401(6)(b)(xvii).

"use" to constitute separate offenses, it easily could have said so by including them in separate subsections of A.R.S. § 13-3407(A), as it did with the various other offenses involving dangerous drugs. Instead, the legislature chose to include both within a single subsection and impose a single penalty for them, regardless of whether the violation involves possession or use. A.R.S. § 13-3407(B)(1). Because "possession" and "use" of a dangerous drug do not constitute two separate offenses, the allegation of the alternate means of committing the offense in one count is not duplicitous. *See State v. Lopez*, 163 Ariz. 108, 113, 786 P.2d 959, 964 (1990) (holding definition of "dangerous offense" including alternate ways for finding dangerousness is not duplicitous); *State v. Cotten*, 228 Ariz. 105, 107-08, ¶ 5, 263 P.3d 654, 656-57 (App. 2011) (holding indictment alleging separate ways of committing theft not duplicitous because theft is a single unified offense).

¶10 In conjunction with her claim that the information was duplicitous, Lore asserts the trial court lacked "jurisdiction" over the charge of use of methamphetamine because there was no evidence of use of methamphetamine at the preliminary hearing. Contrary to Lore's contention, in addition to evidence presented regarding her possession of the baggy of methamphetamine, there was also evidence presented regarding her use of methamphetamine in the form of testimony that she exhibited signs and symptoms

of use of drugs and appeared under the influence. Therefore, her claim that she was convicted on a noncharged offense is not supported by the record.

¶11 For the same reason, we find no merit to her claim that she lacked adequate notice that she was being charged with the use of methamphetamine. Both the complaint and the information filed against her clearly alleged that she "knowingly possessed or used Methamphetamine."

¶12 Finally, we also reject Lore's contention that the trial court erred in refusing her request for remedial measures to avoid the possibility of a nonunanimous verdict. When a duplicitous charge is submitted to a jury, the trial court, upon request by the accused, must take cautionary methods to ensure a unanimous verdict, such as requiring the state to elect which act it alleges constitutes the crime, or instructing the jury that in finding the defendant guilty it must unanimously agree on which act constitutes the crime. *State v. Klokic*, 219 Ariz. 241, 244, ¶ 14, 196 P.3d 844, 847 (App. 2008). But here, the charged offense of possession or use of a dangerous drug was not duplicitous. Although a defendant has the right to a unanimous jury verdict in a criminal case, Ariz. Const. art. 2, § 23, the jury is not required to agree unanimously upon the precise manner by which the defendant committed the charged offense. *State v. Encinas*, 132 Ariz. 493, 496, 647 P.2d 624, 627 (1982).

Because the charged offense of possession or use of a dangerous drug was not duplicitous, the trial court did not err in refusing Lore's request for an instruction that the jury make a unanimous finding of how the offense was committed. *Cotten*, 228 Ariz. at 108, ¶ 6, 263 P.3d at 657.

II. DISCOVERY VIOLATION

¶13 Lore next asserts that the trial court erred in not sanctioning the state for a disclosure violation with respect to blood test results. "Imposing sanctions for non-disclosure is a matter to be resolved in the sound discretion of the trial judge, and that decision should not be disturbed absent a clear abuse of discretion." *State v. Hill*, 174 Ariz. 313, 325, 848 P.2d 1375, 1387 (1993). "Denial of a sanction is generally not an abuse of discretion if the trial court believes the defendant will not be prejudiced." *State v. Towery*, 186 Ariz. 168, 186, 920 P.2d 290, 308 (1996). "We will not find a trial court has abused its discretion unless no reasonable judge would have reached the same conclusion under the circumstances." *State v. Armstrong*, 208 Ariz. 345, 354, ¶ 40, 93 P.3d 1061, 1070 (2004).

¶14 Though the blood test results were requested by Lore in March 2011, the state did not disclose the name of the criminalist who determined that there was methamphetamine in her blood until October 19, 2011, and his lab report and notes until October 24, 2011. Based on the late disclosure, Lore moved to

preclude admission of the blood test results. The state conceded the disclosure violation but opposed the motion arguing lack of prejudice. Specifically, the state asserted that there was no prejudice because the disclosure had been made six weeks before trial, and Lore had the opportunity to interview every witness. The trial court denied Lore's motion for sanctions, ruling that the violation was harmless because there had been sufficient time between disclosure and trial for Lore to prepare her defense.

¶15 When a party fails to disclose material or information as required by Rule 15, the trial court may impose "any sanction it finds appropriate." Ariz. R. Crim. P. 15.7(a). Because the discovery rules "are designed to implement, and not to impede, the fair and speedy determination of cases," a trial court should seek to apply sanctions that affect the evidence and the merits of the case as little as possible. *State v. Smith*, 140 Ariz. 355, 359, 681 P.2d 1374, 1378 (1984). In deciding whether to sanction the offering party for a discovery violation, the trial court should consider (1) the importance of the evidence; (2) surprise or prejudice to the opposing party; (3) whether the violation was motivated by bad faith; and (4) other relevant factors. *Id.*; *see also* Rule 15.7(a) ("All orders imposing sanctions shall take into account the significance of the information not timely disclosed, the impact of the sanction on

the party and the victim and *the stage of the proceedings at which the disclosure is ultimately made.*") (emphasis added). After review of these factors, we find no abuse of discretion by the trial court in declining to impose sanctions.

¶16 First, the blood test results were important to proving the element of use of methamphetamine. Second, any prejudice was ameliorated because the disclosure of the witness was made six weeks before the trial commenced. Therefore, as the trial court noted, Lore had an adequate opportunity to prepare any defense she had to the evidence. Third, the trial court could reasonably find that the state's untimely disclosure was not motivated by bad faith, but rather was the result of an interruption in trial preparation when the case was transferred to the Rule 11 court at the request of Lore's counsel for a determination of Lore's competency to stand trial. Under these circumstances, we conclude that the trial court acted within its discretion in not precluding the untimely disclosed evidence or imposing any other sanction under Rule 15.7.

¶17 Lore also argues that the trial court should have precluded the test results pursuant to Rule 15.8 because they were disclosed after the expiration of a plea offer. Rule 15.8 states that, "upon motion of the defendant," the court "shall consider the impact of the failure to provide . . . disclosure on the defendant's decision to accept or reject a plea offer."

If the court determines that the nondisclosure "materially impacted the defendant's decision and the prosecutor declines to reinstate the lapsed plea offer," the presumptive minimum sanction is preclusion of the evidence. Lore, however, never made such a motion before trial. We therefore reject her claim that the trial court erred in failing to make a Rule 15.8 determination.

III. MOTION FOR JUDGMENT OF ACQUITTAL

¶18 Lore also contends that the trial court erred in denying her motion for judgment of acquittal. Specifically, Lore argues both that there was insufficient evidence to support findings of her use of a dangerous drug and that the trial court did not have jurisdiction over the charged offense. We review claims of insufficient evidence de novo. *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993).

¶19 "A judgment of acquittal is appropriate when 'no substantial evidence [exists] to warrant a conviction.'" *State v. Nunez*, 167 Ariz. 272, 278, 806 P.2d 861, 867 (1991) (citation omitted); *see also* Ariz. R. Crim. P. 20(A). "Substantial evidence is proof that reasonable persons could accept as sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996). In reviewing a claim of insufficient evidence, we view the facts in the light most favorable to

upholding the jury's verdict and resolve all conflicts in the evidence against defendant. *State v. Girdler*, 138 Ariz. 482, 488, 675 P.2d 1301, 1307 (1983). "Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction." *State v. Scott*, 113 Ariz. 423, 424-25, 555 P.2d 1117, 1118-19 (1976).

¶20 Lore argues the evidence was insufficient to permit a finding that she knowingly used methamphetamine because the evidence consisted only of blood test results that she had 470 nanograms of methamphetamine and 58 nanograms of amphetamine in her blood, without any eyewitness testimony of use. We disagree. In addition to the blood test results, there was also testimony that Lore exhibited signs and symptoms of methamphetamine use and had a baggie containing a usable amount of methamphetamine in her purse, together with several additional containers with methamphetamine residue. Although this evidence is circumstantial with respect to the element of use, "[t]he probative value of evidence is not reduced because it is circumstantial." *State v. Murray*, 184 Ariz. 9, 31, 906 P.2d 542, 564 (1995); *see also State v. Scott*, 20 Ariz. App. 211, 212, 511 P.2d 655, 656 (1973) ("[C]ircumstantial evidence . . . bears the same weight as direct evidence."). Viewed in the light most favorable to supporting the conviction, this

circumstantial evidence is sufficient to permit a rational jury to find beyond a reasonable doubt that Lore was guilty of knowingly using methamphetamine. *See State v. Cheramie*, 218 Ariz. 447, 451, ¶ 21, 189 P.3d 374, 378 (2008) (noting that proof of possession of "a 'usable quantity' remains an effective way . . . to show that the defendant 'knowingly' committed the acts described in A.R.S. § 13–3407").

¶21 We also disagree with Lore's argument that the evidence was insufficient to permit a finding of subject matter jurisdiction because there was no evidence that her use of methamphetamine occurred in this state. Arizona has jurisdiction over a criminal offense if "[c]onduct constituting any element of the offense or a result of such conduct occurs within this state." A.R.S. § 13–108(A)(1).

¶22 Here, Lore was present in Arizona with methamphetamine in her blood, possessed a baggy of methamphetamine and empty baggies containing methamphetamine residue in Arizona, and exhibited signs and symptoms of methamphetamine use in Arizona. Based on this evidence, and absent any evidence to the contrary, it can reasonably be inferred that use of methamphetamine occurred in Arizona. The evidence supporting this inference is once again circumstantial, but "[e]vidence wholly circumstantial can support differing, yet reasonable inferences sufficient to defeat a motion for directed verdict." *State v. Anaya*, 165

Ariz. 535, 543, 799 P.2d 876, 884 (App. 1990). Furthermore, the state is not required to disprove "every conceivable hypothesis of innocence when guilt has been established by circumstantial evidence." *State v. Nash*, 143 Ariz. 392, 404, 694 P.2d 222, 234 (1985). There was no error by the trial court in denying Lore's motion for judgment of acquittal based on her assertion of lack of subject matter jurisdiction. *See State v. Fischer*, 219 Ariz. 408, 419, ¶ 42, 199 P.3d 663, 674 (App. 2008) (holding that an Arizona court had jurisdiction when evidence of the defendant's presence in the state was sufficient to support an inference that sexual conduct with a minor occurred in Arizona).

IV. DOUBLE JEOPARDY

¶23 Finally, Lore claims that her conviction for possession or use of dangerous drugs violated the constitutional guarantee against double jeopardy because she had also been convicted of driving under the influence (DUI) based on her use of the very same methamphetamine. We review double jeopardy claims de novo. *State v. Welch*, 198 Ariz. 554, 555, ¶ 5, 12 P.3d 229, 230 (App. 2000).

¶24 Lore mentioned the possibility of a double jeopardy defense before trial but never followed through with a motion to dismiss on that ground. When a party fails to raise an issue below, our review is limited to fundamental error. *State v. Henderson*, 210 Ariz. 561, 567–68, ¶¶ 19–20, 115 P.3d 601, 607–08

(2005). The failure to raise a claim of double jeopardy in the trial court is not necessarily a bar to obtaining relief, because a double jeopardy violation is fundamental error. *State v. Ortega*, 220 Ariz. 320, 323, ¶ 7, 206 P.3d 769, 772 (App. 2008). The problem with Lore's claim on appeal, however, is that because she did not pursue the issue below, no record was created of the alleged prior conviction on which the double jeopardy claim is predicated.

¶25 Lore includes documents with her opening brief that purport to establish that before her conviction in the instant case, she pled guilty in Phoenix City Court to DUI, a class 1 misdemeanor charge, in violation of A.R.S. § 28-1381(A)(1). These documents, however, are not part of the record on appeal. As an appellate court, we generally do not consider "materials that are outside the record on appeal" because this court "does not act as a fact-finder." *State v. Schackart*, 190 Ariz. 238, 247, 947 P.2d 315, 324 (1997); *see also Martin v. State*, 22 Ariz. 327, 328, 197 P. 578, 579 (1921) ("We cannot consider any evidence outside of that contained in the record on appeal."). Accordingly, we hold that Lore's double jeopardy claim necessarily fails for lack of proof.

¶26 Further, even if the record was sufficient to permit consideration of the double jeopardy claim, we would find it to be meritless. Double jeopardy bars multiple prosecutions and

punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). In deciding whether a defendant has been convicted and punished twice for the same offense, we apply the "same-elements" test from *Blockburger v. United States*, 284 U.S. 299 (1932), in which we inquire "whether each offense contains an element not contained in the other." *United States v. Dixon*, 509 U.S. 688, 696, (1993) (holding that the "same-elements" test is the only test for double jeopardy bar, overruling the "same-conduct" test adopted by *Grady v. Corbin*, 495 U.S. 508 (1990)); *see also State v. Eagle*, 196 Ariz. 188, 190, ¶ 6, 994 P.2d 395, 397 (2000) (citing *Blockburger* test). In applying the *Blockburger* test, we focus "on the statutory elements of the two crimes charged, not on the factual proof that is offered or relied upon to secure a conviction." *State v. Cook*, 185 Ariz. 358, 361, 916 P.2d 1074, 1077 (App. 1995). If each offense contains an element not present in the other, they are not the same offense, and double jeopardy does not bar successive prosecution and additional punishment. *Blockburger*, 284 U.S. at 304.

¶27 The elements of possession or use of a dangerous drug are: (1) knowing (2) possession or use (3) of a dangerous drug. A.R.S. § 13–3407(A)(1). The elements of DUI in violation of A.R.S. § 28–1381(A)(1) are: (1) driving or being in actual physical control of a vehicle; (2) while under the influence of

intoxicating liquor, any drug, a vapor releasing substance containing a toxic substance, any combination of liquor, drugs or vapor releasing substances at the time of driving or being in actual physical control; and (3) the ability to drive was impaired to the slightest degree by reason of being under the influence. A.R.S. § 28–1381(A)(1). Both offenses contain at least one element not present in the other. Because they are not the same offense, the constitutional bar against double jeopardy does not preclude the successive prosecution of the two offenses. *Blockburger*, 284 U.S. at 304; *Cook*, 185 Ariz. at 361, 916 P.2d at 1077.

CONCLUSION

¶28 For the foregoing reasons, we affirm Lore's conviction and sentence.

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
PATRICIA A. OROZCO, Presiding Judge

/s/
_____
DANIEL A. BARKER, Judge *Pro Tempore**

*The Honorable Daniel A. Barker, Judge (Retired) of the Court of Appeals, Division One, is authorized by the Chief Justice of the Arizona Supreme Court to participate in the disposition of this appeal pursuant to the Arizona Constitution, Article 6, Section 3, and A.R.S. §§ 12-145 to -147 (2003).