IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 3/12/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

STATE OF ARIZONA,	)	1 CA-CR 12-0173
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
LISA LYNN ANDREWS,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2011-127769-001

The Honorable Joseph C. Welty, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Michael O'Toole, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Mikel P. Steinfeld, Deputy Public Defender
Attorneys for Appellant

G O U L D, Judge

¶1 In this appeal, we consider whether the trial court's answering instruction to a juror's question constituted fundamental error. For the following reasons, we hold that it did not.

Facts and Procedural Background

¶2 Lisa Lynn Andrews ("Defendant") was charged with possession of dangerous drugs for sale, possession of marijuana, and possession of drug paraphernalia.

¶3 At the end of the trial the jurors were given the following standard instruction regarding the elements of the crime of possession of dangerous drugs:

> The crime of possession of dangerous drugs for sale requires proof of the following:
>
> 1. The defendant knowingly possessed dangerous drugs, and
> 2. The substance was in fact a dangerous drug, and
> 3. The possession must be for purposes of sale. "Sale" means an exchange for anything of value or advantage, present or prospective.

See Rev. Ariz. Jury Instr. ("RAJI") Stat. Crim. 34.072 (3d ed. 2011) (Possession of Dangerous Drug for Sale).

¶4 During jury deliberations, the jury asked the following question regarding the elements of the crime of possession of dangerous drugs for sale: "Does '[t]he possession must be for purposes of sale' include giving to another person for sale?"

After discussing the question with the parties, the court gave the following instruction:

> To convict a defendant of the crime of possession of dangerous drugs for sale you need to find that the State has proven all elements of the offense beyond a reasonable doubt. You need not find beyond a reasonable doubt that the defendant intended to sell the drugs herself.

Both parties agreed to the instruction.

¶5 Defendant was found guilty on all charges. After being sentenced, she timely appealed. 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) (West 2012), 13-4031 (West 2012), and -4033(A)(1) (West 2012).

Discussion

¶6 Because Defendant made no objection to the court's answering instruction, we review for fundamental error only. *Ruben M. v. Ariz. Dep't of Econ. Sec.*, 230 Ariz. 236, 239, ¶ 13, 282 P.3d 437, 440 (App. 2012) ("[W]hen a party fails to object properly, we review solely for fundamental error.") (internal punctuation and citation omitted).

¶7 Fundamental error is limited to those "'rare' cases that involve 'error 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.'" *State v. Henderson*, 210 Ariz. 561,

567, ¶ 19, 115 P.3d 601, 607 (2005). Under this type of review, the defendant bears the burden of proving entitlement to relief. *Henderson,* 210 Ariz. at 567, ¶ 19, 115 P.3d at 607. In order to prevail, the defendant must establish (1) that a fundamental error occurred and (2) that the error caused prejudice. *Id.* at 567, ¶ 20, 115 P.3d at 607.

¶8 Our supreme court has emphasized that "rarely will an improperly given instruction 'justify reversal of a criminal conviction when no objection has been made in the trial court.'" *State v. Van Adams*, 194 Ariz. 408, ¶ 17, 984 P.2d 16, 23 (1999) (internal citation and punctuation omitted). However, fundamental error has been found in at least two circumstances involving jury instructions: (1) when the jury was instructed on a nonexistent theory of liability, *State v. Ontiveros*, 206 Ariz. 539, 542, ¶ 17, 81 P.3d 330, 333 (App. 2003), and (2) when the instruction relieved the State of its burden of proving an element of the offense. *State v. Kemper*, 229 Ariz. 105, 106-07, ¶ 5, 271 P.3d 484, 485-86 (App. 2011).

¶9 Defendant raises two main arguments regarding the court's answer to the jury's question: (1) the answering instruction was based on a theory (accomplice liability) that was not alleged or otherwise explained to the jury and (2) the instruction relieved the State of its burden of proving each

element beyond a reasonable doubt. We address each argument in turn.

I. Accomplice Liability

¶10 According to Defendant, in order to prove she was guilty of possession of dangerous drugs for sale, the State was limited to proving her guilt based on one of two theories/methods of commission: (1) Defendant intended to personally sell the drugs herself, or (2) Defendant was the accomplice of another who intended to sell the drugs. Defendant argues the court's answer to the jury's question amounted to an improper instruction on the second of these two theories, accomplice liability. Defendant contends the court's "accomplice" instruction was not only a misstatement of the law on accomplice liability, but was also improper because there was no allegation of accomplice liability charged in the indictment. *See* Ariz. R. Crim P. 13.2(b)("The indictment or information shall state for each count...the statute...or other provision of law which the defendant is alleged to have violated.").

¶11 We do not agree with Defendant's characterization that the court's answering instruction was an accomplice instruction. Rather, based on our review of the record, we conclude the answering instruction simply explained to the jury that personal sales were not the only means of committing the crime of possession of dangerous drugs for sale.

¶12 Defendant's arguments are premised on a narrow construction of the term "sale" with respect to the crime of possession of dangerous drugs for sale. In reality, our statutory scheme broadly defines the types of transactions that constitute a "sale." *Weitekamp v. Fireman's Fund Ins. Co.*, 147 Ariz. 274, 275, 709 P.2d 908, 909 (App. 1985)(when interpreting a statute, we give meaning to each word or phrase in a statute so none is rendered insignificant, contradictory, superfluous, or void). Under A.R.S. § 13-3401(32), "[s]ale" is defined as "an exchange[s] for *anything* of value or *advantage*, present or *prospective.*" (emphasis added). The scope of this definition includes *any* advantage or *anything* beneficial a defendant receives in return for possessing, that is holding dangerous drugs for the purposes of sale. Moreover, the benefit need not be immediate, but may be something a defendant receives in the future.

¶13 In light of this statutory scheme, we conclude the court committed no error, much less fundamental error, in its answering instruction to the jury. Prior to receiving the jury's question, the court properly instructed the jury on all of the elements of possession of dangerous drugs for sale, including the broad statutory definition of "sale." In the answering instruction, the court emphasized that in order to find Defendant guilty of possession of dangerous drugs for sale, the State was

required to prove "all the elements of the offense beyond a reasonable doubt." The court then correctly added, in direct response to the jury's question, that Defendant's liability for this crime was not limited to one specific theory/means of commission, e.g., Defendant personally selling the drugs in her possession to some third party.

¶14 We assume that jurors follow the instructions they were given. *State v. Newell*, 212 Ariz. 389, ¶¶ 68-69, 132 P.3d 833, 847 (2006) (jurors are presumed to follow the instructions they are given.). When considering the instructions as a whole, as we must, we find no error. *See State ex rel. Thomas v. Granville*, 211 Ariz. 468, 471, ¶ 8, 123 P.3d 662, 665 (2005) (explaining that instructions to jury must be viewed as a whole, not piecemeal).

II. Burden of Proof

¶15 Defendant asserts that the last sentence of the court's answering instruction, "You need not find beyond a reasonable doubt that the defendant intended to sell the drugs herself," was tantamount to advising the jury the State was not required to prove Defendant possessed the dangerous drugs for sale. As a result, Defendant contends the court's answering instruction improperly relieved the State of its burden of proof. An instruction that relieves the State of its burden of proving an

element of the offense constitutes fundamental error. *See Kemper*, 229 Ariz. at 106-07, ¶ 5, 271 P.3d at 485-86.

¶16 We conclude the answering instruction did not relieve the State of its burden of proof. As noted above, the court properly instructed the jury on all the elements of the crime of possession of dangerous drugs for sale. *See supra* ¶ 13. The last sentence of the answering instruction did not relieve the State of its burden; rather, it explained to the jury that personal sale by the Defendant was not the only theory/means by which Defendant could be found guilty of committing the crime of possession of dangerous drugs for sale. *Id*. Accordingly, we find no error, let alone fundamental error.

III. Lack of Prejudice

¶17 Even assuming for the sake of argument that the court's answering instruction constituted fundamental error, Defendant still would not be able to show prejudice. To establish prejudice, Defendant must show that a reasonable jury, applying the appropriate instruction, would have reached a different result. *See Henderson*, 210 Ariz. at 569, ¶ 27, 115 P.3d at 609; *State v. Valverde*, 220 Ariz. 582, ¶ 12, 208 P.3d 233, 236 (2009) (establishment of prejudice varies on case-by-case basis after fact-intensive inquiry).

¶18 Here, approximately 20 small plastic bags were found on Defendant's person along with a bag containing 8.05 grams of

methamphetamine and a bag containing .35 grams of methamphetamine. Defendant told police that she received a good deal on the methamphetamine because she helped "push it." She also admitted that she planned to sell a portion of the drugs to a friend.

¶19 While Defendant later testified at trial that she was holding the drugs for somebody else under duress, her trial testimony was inconsistent with the statements she had made earlier to the police. A reasonable juror could not have ignored these inconsistencies nor the fact that she failed to provide any alternative explanation for the 20 small baggies that were found on her person.

¶20 Given this evidence, even if we were to assume that the instruction was given in error, we would conclude Defendant has failed to satisfy her burden of establishing she suffered prejudice. *See Henderson*, 210 Ariz. at 568, ¶ 22, 115 P.3d at 608 (noting that the defendant, not the state, bears the burden of establishing both that fundamental error occurred and that the error caused her prejudice).

Conclusion

¶21 For the foregoing reasons, we affirm.

/S/_____
ANDREW W. GOULD, Judge

CONCURRING:

/S/_____
PATRICIA K. NOR**R**IS, Presiding Judge

/S/_____
RANDALL M. HOWE, Judge