

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
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 09-0299
)
Appellee,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
)
ADAN LUNA-LOPEZ,)
) (Not for Publication -
Appellant.) Rule 111, Rules of the
) Arizona Supreme Court)
)
)
)
)
)
)

Appeal from the Superior Court in Yuma County

Cause No. S1400CR200800735

The Honorable Mark Wayne Reeves, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel,
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K E S S L E R, Judge

¶1 Adan Luna-Lopez ("Luna-Lopez") appeals from his convictions for one count of importation of marijuana and one count of possession of marijuana for sale, both class two felonies. On appeal, Luna-Lopez argues the trial court erred by not giving a jury instruction on a lesser-included charge of possession of marijuana for count one, importation of marijuana. For reasons that follow, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 On June 7, 2008, Luna-Lopez attempted to enter the United States at the San Luis Port of Entry at the United States/Mexico border carrying two pallets of cement patio furniture in his truck. After having passed inspection, Luna-Lopez left the cargo dock and drove his truck toward the "wrong exit gate." He was then stopped by border patrol Officer S., who testified that Luna-Lopez acted nervously and could not answer questions about his destination. Officer S. further inspected the cargo and discovered packages containing marijuana hidden in hollowed out sections. The total weight of the packages was determined to be 242.45 kilos (534 pounds).

¶3 Luna-Lopez was placed under arrest and interviewed by I.C.E. Special Agent B. ("Agent B."). Agent B. testified that Luna-Lopez could not answer questions about his employer's company name or address and gave an incorrect number when asked

for his employer's phone number. Agent B. testified that Luna-Lopez' demeanor was rigid, and he appeared uncomfortable.

¶14 At trial, Luna-Lopez' counsel conceded that Luna-Lopez had driven across the border into Arizona carrying packages of marijuana. He argued, however, that there was no evidence that Luna-Lopez knew of the existence of the marijuana in his cargo, or that he had any intent to sell it.

¶15 Prior to trial, Luna-Lopez filed a request for jury instructions, requesting a lesser-included instruction for possession of marijuana. Luna-Lopez, however, did not specify whether he was requesting the lesser-included offense of possession of marijuana on one or both counts.

¶16 After both parties had rested their cases, the court discussed the jury instructions with counsel. During that conference, the court confirmed that Luna-Lopez' counsel requested a lesser-included charge of possession for count two only, the possession for sale count.

¶17 Specifically, when the court asked him if he requested a lesser-included instruction on count two, Luna-Lopez's counsel replied, "Yes, lesser included possession for sale. Although I suppose it might even be included a lesser included of importation as well, but I did ask for that, yes." The court attempted to clarify and asked, "Any other lesser included you are asking for?" Counsel replied, "Not that I can think of,

Judge." The court then reiterated counsel's request and stated, "[Y]ou have asked just for one lesser included possession of marijuana."

¶18 Later in the discussion, the court commented on counsel's request, "I do believe . . . this possession is really only lesser included of possession of marijuana for sale; it's not a lesser included on importation. . . . Mr. Franklin, in that regard, that's just for that count." Luna-Lopez's counsel did not object.

¶19 Accordingly, in its final written instructions, the trial court instructed the jury on possession of marijuana as a lesser-included offense for count two, possession of marijuana for sale, but not as a lesser-included offense for count one, importation of marijuana. The jury convicted Luna-Lopez, as charged, on both counts.

¶10 Luna-Lopez filed a timely notice of appeal. We have jurisdiction pursuant Article 6, Section 9 of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") Sections 12-120.21(A)(1)(2003), 13-4031 (2001), and -4033(A)(Supp. 2009).

ANALYSIS

I. Standard of Review

¶11 On appeal, Luna-Lopez contends the superior court committed error by failing to instruct the jury that possession of marijuana is a lesser-included offense of importation of

marijuana. A trial court's denial of a requested jury instruction is reviewed for an abuse of discretion. *State v. Wall*, 212 Ariz. 1, 3, ¶ 12, 126 P.3d 148, 150 (2006) (citation omitted). However, when jury instructions on a lesser-included offense are not requested at trial, we review for fundamental error. *State v. Andriano*, 215 Ariz. 497, 504, ¶ 32, 161 P.3d 540, 547 (2007).

¶12 Although Luna-Lopez maintains that he requested an instruction on a lesser-included charge for count one (importation), the record clearly shows that he requested a lesser-included instruction for count two (possession for sale) only. Thus, we review for fundamental error.

II. The Superior Court Did Not Err By Failing to Include A Jury Instruction For A Lesser Offense

¶13 For a defendant to prevail under a fundamental error review, he must establish that error exists, that the error was fundamental, and, moreover, the error caused him prejudice. *State v. Henderson*, 210 Ariz. 561, 568, ¶ 20, 115 P.3d 601, 608 (2005).

¶14 A trial court is only required to give an instruction on a lesser-included offense if the instruction is requested and the offense is "necessarily included." *Wall*, 212 Ariz. at 3, ¶ 13, 126 P.3d at 150; See also Arizona Rules of Criminal Procedure ("Ariz. R. Crim. P.") 23.3 ("Forms of verdicts shall

be submitted to the jury for all offenses *necessarily included* in the offense charged.") (emphasis added); Ariz. R. Crim. P. 21.3 cmt. c (reverses case law which held "the court is duty bound in all homicide cases to instruct the jury on all necessarily-included offenses that the evidence will support, regardless of whether or not such instruction is requested.") (citation omitted). As the Court in *Wall* explained:

An offense is "lesser included" when the "greater offense cannot be committed without necessarily committing the lesser offense." But an offense is "necessarily included," and so requires a jury instruction be given, only when it is lesser included *and* the evidence is sufficient to support giving the instruction. In other words, if the facts of the case . . . are such that a jury could reasonably find that only the elements of a lesser offense have been proved, the defendant is entitled to have the judge instruct the jury on the lesser included offense.

212 Ariz. at 3, ¶ 14, 126 P.3d at 150 (citation omitted); see also *State v. Schroeder*, 95 Ariz. 255, 259, 389 P.2d 255, 257 (1964) (holding "instructions on lesser offenses are justified only when there is evidence upon which the jury could convict of a lesser offense and, at the same time, find that the state had failed to prove an element of the greater crime.").

¶15 The trial court did not commit error, let alone fundamental error, by failing to instruct the jury on a lesser-included offense for count one. It is true that possession of marijuana is a lesser-included offense of transportation of marijuana. See *State v. Chabolla-Hinojosa*, 192 Ariz. 360, 364,

¶ 15, 965 P.2d 94, 98 (App. 1998) ("In Arizona, it is settled that possession of marijuana is a lesser-included offense of both transportation of marijuana and possession of marijuana for sale."). However, the facts of this case are such that the lesser-included offense of possession of marijuana is not a necessarily included offense.

¶16 It is undisputed that Luna-Lopez drove through the Arizona/Mexico border carrying cargo filled with marijuana; his counsel conceded this fact in his opening statement. Luna-Lopez' sole defense is that he was not aware that the cargo contained marijuana; thus, he did not possess the requisite knowledge to be convicted of count one.

¶17 However, both the crimes of possession and importation require knowledge. See A.R.S. § 13-3405(A)(4)(Supp. 2009) ("A person shall not *knowingly*: . . . import into this state . . . marijuana."); A.R.S. § 13-3405(A)(1) (" A person shall not *knowingly*: [p]ossess or use marijuana.")(emphasis added). Thus, on the facts of this case, the jury instruction of a lesser-included offense for count one was not justified because the only defense was knowledge. It would have been impossible for any jury to convict on the lesser charge of possession, requiring knowledge, while at the same time find that the state failed to prove knowledge as an element of the greater crime (importation). If Luna-Lopez was convicted of the lesser charge

of possession, the jury would have had to believe he had knowledge of the marijuana in his cargo. His only defense against an importation conviction, lack of knowledge, would fail. Accordingly, the trial court was not required to include instruction on a lesser-included offense for count one, and therefore, did not commit error, let alone fundamental error.

III. The Failure to Include A Jury Instruction Did Not Prejudice the Defendant

¶18 Even if the trial court committed fundamental error by failing to instruct the jury on the lesser-included charge for count one, the error would not require reversal because it would not have prejudiced Luna-Lopez. *See Henderson*, 210 Ariz. at 567-68, ¶ 20, 115 P.3d at 607-08 (holding that reversal for fundamental error requires the plaintiff to show the error prejudiced him).

¶19 There is no possibility that the jurors could have concluded Luna-Lopez was guilty of possession and not guilty of importation. Both crimes require knowledge. Luna-Lopez' only defense was lack of knowledge; he conceded he imported marijuana into the State. The jury could not have convicted him of mere possession and acquitted him of importation.

CONCLUSION

¶20 For the foregoing reasons, the trial court did not err by failing to provide an instruction to the jury on a lesser-

included charge for count one. Accordingly, we affirm the conviction and sentence.

/s/

DONN KESSLER, Judge

CONCURRING:

/s/

PATRICK IRVINE, Presiding Judge

/s/

MICHAEL J. BROWN, Judge