

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: 06/21/2011  
RUTH A. WILLINGHAM,  
CLERK  
BY: DLL

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) 1 CA-CR 09-0921  
)  
Appellee, ) DEPARTMENT C  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
MICHELLE LYNN HUNSAKER, ) Rule 111, Rules of  
) the Arizona Supreme  
Appellant. ) Court)  
)  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-117199-001 SE

The Honorable Helene F. Abrams, Judge

**AFFIRMED**

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

James J. Haas, Maricopa County Public Defender Phoenix  
By Karen M. V. Noble, Deputy Public Defender  
Attorneys for Appellant

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O R O Z C O, Judge

¶1 Michelle Lynn Hunsaker (Defendant) appeals her  
convictions and sentences for count one, possession or use of

dangerous drugs (methamphetamine), a class four felony, and count two, possession of drug paraphernalia (a baggie), a class six felony. For the reasons that follow, we affirm.

#### **FACTS AND PROCEDURAL HISTORY**

¶2 In March 2008, a police officer observed Defendant in possession of two baggies containing a "crystal-like substance" that ultimately tested positive for methamphetamine. Defendant was charged with possession or use of methamphetamine, a dangerous drug; and possession of a baggie, which when used to store drugs is considered drug paraphernalia. See Ariz. Rev. Stat. (A.R.S.) § 13-3415.F.2 (2010).<sup>1</sup>

¶3 The State requested a Rule 609 hearing prior to trial, seeking to impeach Defendant with two prior convictions from 2007, see Ariz. R. Evid. 609; namely, one misdemeanor conviction and one felony conviction, both for possession or use of marijuana. Defendant argued that use of these prior convictions for purposes of impeachment was impermissible under Proposition 200 (Prop. 200) and Arizona Rule of Evidence 609 (Rule 609). See A.R.S. § 13-901.01.A, .F (2010) (requiring suspension of prison sentence and imposition of probation for qualifying offenses). The trial court agreed and the State withdrew its request for a 609 hearing.

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<sup>1</sup> We cite to the current version of the applicable statutes when no revisions material to this decision have since occurred.

¶4 The day before trial, the State posited that Defendant also had a 1993 conviction for possession of marijuana. The State argued that the 1993 conviction, together with the 2007 misdemeanor conviction, places the 2007 felony conviction outside of Prop. 200, making it usable for impeachment purposes should Defendant testify. Defendant countered that this was insufficient notice.

¶5 Alternatively, the State argued that the 2007 felony conviction was for an undesignated felony in violation of A.R.S. § 901.01.B, making it ineligible under Prop. 200. The trial court concluded that because Defendant's plea agreement for the 2007 felony conviction cites A.R.S. § 13-901.01.B, indicating that it was not Prop. 200 eligible, Defendant was properly on notice that she could be impeached with that conviction under Rule 609. By the terms of the plea agreement, Defendant stipulated to placing the conviction outside the ambit of Prop. 200.<sup>2</sup> The trial court found that the probative value of the 2007 felony conviction outweighed the prejudicial effect, and that the State could use it to impeach Defendant.

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<sup>2</sup> We note that criminal defendants may stipulate to removing a conviction from the scope of Prop. 200. See *State v. Carter*, 216 Ariz. 286, 288, ¶ 11, 165 P.3d 687, 689 (App. 2007) (rejecting the defendant's "argument that under A.R.S. § 13-901.01, a defendant convicted of a drug offense may not be sentenced to prison pursuant to a plea agreement without proof of two prior drug convictions").

¶6 Defendant declined to testify and the State never introduced the prior conviction at trial. The jury found Defendant guilty on both counts. The trial court sentenced Defendant to a minimum term of three years' imprisonment for count one, possession or use of dangerous drugs; and a concurrent, presumptive term of 1.75 years' imprisonment for count two, possession of drug paraphernalia. Defendant timely appealed and we have jurisdiction in accordance with Article 6, Section 9, of the Arizona Constitution, and A.R.S. §§ 12-120.21.A.1 (2003), 13-4031, and -4033.A (2010).

#### DISCUSSION

¶7 Defendant argues on appeal that the trial court's ruling was error because it would have erroneously permitted the State to use the 2007 felony conviction for impeachment purposes, which prevented Defendant from testifying and deprived her of a fair trial. Specifically, Defendant contends that: (1) the State's notice of its intention to use the prior 2007 felony conviction for impeachment was insufficient;<sup>3</sup> (2) the 1993 conviction was not properly before the court;<sup>4</sup> and (3) the Rule

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<sup>3</sup> We note that the State noticed the 2007 felony conviction in its motion for a Rule 609 hearing.

<sup>4</sup> Because the 1993 conviction was not a factor in the trial court's ruling, see *supra* ¶¶ 4-5, we do not address this argument.

609 hearing on the matter of whether the 2007 felony conviction may be properly used to impeach Defendant was insufficient.

¶18 "When reviewing a ruling on the admissibility of prior convictions, this court will overturn the trial court's determination only if it proves to have been a clear abuse of discretion." *State v. Green*, 200 Ariz. 496, 498, ¶ 7, 29 P.3d 271, 273 (2001). An abuse of discretion occurs in the "exercise of discretion which is manifestly unreasonable, exercised on untenable grounds or for untenable reasons." *State v. Wassenaar*, 215 Ariz. 565, 570, ¶ 11, 161 P.3d 608, 613 (App. 2007) (quoting *State v. Woody*, 173 Ariz. 561, 563, 845 P.2d 487, 489 (App. 1992)).

¶19 Defendant argues that the trial court's implementation of the Rule 609 hearing was insufficient, resulting in an erroneous ruling. However, by not testifying below, Defendant waived this argument. *State v. Smyers*, 207 Ariz. 314, 316, ¶ 5, 86 P.3d 370, 372 (2004). "[L]ong-established and controlling Arizona law . . . requires a defendant to testify at trial before he can challenge an adverse pretrial ruling conditionally admitting prior convictions for impeachment." *Id.* Thus, because Defendant declined to testify below she accordingly failed to preserve this issue for appellate review.<sup>5</sup>

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<sup>5</sup> Defendant argues on appeal that "a record exists as to what [Defendant] may have told jurors," as developed at a settlement

¶10 Because the trial court's ruling was not "untenable," and Defendant failed to preserve the issue for appellate review by testifying below, we find no abuse of discretion.

**CONCLUSION**

¶11 For the forgoing reasons, we affirm the Defendant's convictions and sentences.

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PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

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DONN KESSLER, Judge

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MICHAEL J. BROWN, Judge

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conference. However, a proffer of testimony does not cure Defendant's failure to testify; as her "trial testimony could, for any number of reasons, differ from the proffer." *Luce v. United States*, 469 U.S. 38, 41 n.5 (1984).