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: 02/24/11
RUTH WILLINGHAM, ACTING CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. HUMBERTO MURILLO MUNOZ, Appellant.	)	1 CA-CR 10-0022 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Yuma County

Cause No. CR S1400CR200900589

The Honorable Andrew W. Gould, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Jeffrey L. Sparks, Assistant Attorney General
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

Paul J. Mattern — Phoenix
by Paul J. Mattern
Attorney for Appellant

B A R K E R, Judge

¶1 Humberto Murillo Munoz ("Defendant") appeals his convictions and sentences for importation of marijuana (having a weight of 2 pounds or more), a Class 2 felony; possession of marijuana for sale (having a weight of 4 or more pounds), a Class 2 felony; and possession of drug paraphernalia, a Class 6 felony. Defendant contends that the trial judge should have required the jury to find whether the weight of the marijuana met or exceeded the amounts specified. Because the undisputed weight of the marijuana at issue was at least 216 pounds, and Defendant agreed that no jury finding was necessary, we affirm.

Facts and Procedural Background

¶2 In April of 2009, Defendant was stopped by U.S. Customs and Border Protection agents at the Mexican border while carrying 216 pounds of marijuana in a pickup truck. Defendant was indicted, and his trial began in late October 2009.

¶3 Our statutory scheme provides that importation of marijuana of 2 pounds or more and possession of marijuana for sale of 4 pounds or more constitute class 2 felonies. Ariz. Rev. Stat. ("A.R.S.") § 13-3405(B)(6), (11) (2005). While resolving jury instructions during trial, the court discussed with counsel whether to require a jury finding as to the weight of the drugs:

> THE COURT: . . . . I don't know that we have to do this, but I've given the jury a place to make a finding as to the weight. I guess there really isn't any dispute because the weight is certainly more than the highest statutory limit of four pounds. Counsel, do you think you need for the jury to make these special findings regarding the weight or simply a guilty or not guilty will suffice?
>
> [THE STATE]: Judge, I've had judges do it both ways.
>
> [DEFENDANT'S COUNSEL]: Your Honor, I think I would agree. I don't think that the weights are necessary here.
>
> THE COURT: Okay. I can see it in a case where maybe it's borderline, but it's not really borderline. All right. I'll take out those findings.

As a result of that discussion, neither the instructions nor the verdict forms required the jury to find whether the marijuana met the specified weight.

¶4 The jury subsequently found Defendant guilty of all three charged offenses. Defendant was sentenced on December 17, 2009, and timely filed a notice of appeal. We have jurisdiction under A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2001), and 13-4033(A)(2) (Supp. 2008).

Discussion

¶5 No reasonable juror could have concluded the weight of the marijuana did not exceed 4 pounds. Defendant never contested the fact that the marijuana at issue weighed 216

pounds. Thus, whether the error was invited or not, the failure to instruct here, even on an essential element, was not structural error. *See Nader v. United States*, 527 U.S. 1, 17 (1999) ("[W]here a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless.").

¶6 Likewise, there was no fundamental error. If the error was not invited, the error is subject to fundamental error analysis when no objection is made. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). To be fundamental error, however, there must be prejudice. *Id.* at 568, ¶ 26, 115 P.3d at 608. As noted, on the record before us, it is uncontested that the weight of the marijuana was 216 pounds, well in excess of the applicable weight requirement. Thus, there was no prejudice.

Conclusion

¶7 For the reasons above, Defendant's convictions and sentences are affirmed.

/s/
_____
DANIEL A. BARKER, Presiding Judge

CONCURRING:

/s/
_____
MARGARET H. DOWNIE, Judge

/s/
_____
MICHAEL J. BROWN, Judge