IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

WILLIAM JOHN RITZ,
Appellant.

No. 2 CA-CR 2014-0082
Filed January 29, 2015

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20120153003
The Honorable Christopher C. Browning, Judge

**AFFIRMED IN PART; VACATED IN PART;
MODIFIED IN PART**

COUNSEL

Mark Brnovich, Arizona Attorney General
By Amy M. Thorson, Assistant Attorney General, Tucson
Counsel for Appellee

Lori J. Lefferts, Pima County Public Defender
By Abigail Jensen, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Kelly authored the decision of the Court, in which Judge Howard and Judge Vásquez concurred.

K E L L Y, Presiding Judge:

¶1 William Ritz appeals his convictions and sentences for two counts of possession of a dangerous drug and possession of a deadly weapon during the commission of a felony drug offense. He argues the trial court's instruction to the jury on the use of a firearm during the commission of a felony drug offense was incorrect, his convictions for possession of a dangerous drug violate double jeopardy principles, and the financial judgment and order entered after sentencing contains an erroneous surcharge. For the following reasons, we vacate Ritz's conviction for one count of possession of a dangerous drug and modify the financial judgment and order to conform to the court's oral pronouncement. We affirm his convictions and sentences in all other respects.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining Ritz's convictions and resolve all reasonable inferences against him. *See State v. Snider*, 233 Ariz. 243, ¶ 2, 311 P.3d 656, 658 (App. 2013). Ritz was the driver of a vehicle stopped by a Tucson police officer for a traffic violation in the early morning in January 2012. The officer, Steven Acevedo, saw four people in the vehicle, including Ritz. In response to Acevedo's questions, Ritz stated there was a weapon in the vehicle. Acevedo then conducted a criminal history check on Ritz using his in-car police computer. After he learned that Ritz's driver's license had been suspended, requiring court action, he impounded Ritz's car.

¶3 Attendant to impounding the vehicle, Acevedo conducted an inventory search of its contents. The search revealed a Sig Sauer handgun in the center console of the vehicle, a semiautomatic handgun in the glove compartment, .896 grams of methamphetamine in a gum wrapper inside a plastic bag that Ritz was holding and had set down, 12.1 grams of methamphetamine on the front passenger-side floorboard, 40.18 grams of methamphetamine in a brown paper bag on the right rear-passenger floorboard, and digital scales in the right rear-passenger seat.

¶4 Ritz was charged with transportation of a dangerous drug for sale, possession of a dangerous drug for sale, possession of drug paraphernalia, and possession of a deadly weapon during the commission of a felony drug offense. A jury found him guilty of two counts of possession of a dangerous drug[1] and possession of a deadly weapon during the commission of a felony drug offense. The trial court suspended the imposition of sentence and placed Ritz on concurrent terms of four years' probation for each count. Ritz timely appealed.

Jury Instruction

¶5 Ritz argues the trial court erroneously instructed the jury regarding his weapons misconduct charge. We review de novo whether a jury instruction properly states the law. *State v. Johnson*, 212 Ariz. 425, ¶ 15, 133 P.3d 735, 741 (2006). Ritz concedes that he did not object to this instruction below. We therefore review only for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). Fundamental error is that "'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

[1]Possession of a dangerous drug is a lesser-included offense of both transportation of a dangerous drug for sale (count one of the indictment) and possession of a dangerous drug for sale (count two). *See State v. Cheramie*, 218 Ariz. 447, ¶¶ 12, 22, 189 P.3d 374, 376, 378 (2008).

fair trial.'" *Id.* ¶ 19, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984).

¶6 "To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id.* ¶ 20. To prove prejudice, Ritz must show that a reasonable, properly instructed jury "'could have reached a different result.'" *See State v. James*, 231 Ariz. 490, ¶ 15, 297 P.3d 182, 186 (App. 2013), *quoting Henderson*, 210 Ariz. 561, ¶ 27, 115 P.3d at 609. "'[I]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.'" *State v. Zaragoza*, 135 Ariz. 63, 66, 659 P.2d 22, 25 (1983), *quoting Henderson v. Kibbe*, 431 U.S. 145, 154 (1977); *accord State v. Gomez*, 211 Ariz. 494, ¶ 20, 123 P.3d 1131, 1136 (2005).

¶7 Ritz was charged with "possession of a deadly weapon during the commission of a felony drug offense" in violation of A.R.S. § 13-3102(A). Subsection (A)(8) of that statute prohibits "knowingly . . . [u]sing or possessing a deadly weapon during the commission of any felony" drug offense. Consequently, the trial court instructed the jury that "[t]he crime of possession of a deadly weapon during the commission of a felony drug offense requires proof that the defendant knowingly used or possessed a deadly weapon and intended to use, or could have used, such deadly weapon during the commission of any felony drug offense." The court also instructed the jury that transportation and possession of a dangerous drug for sale, possession of a dangerous drug, and possession of drug paraphernalia were all felony drug offenses.

¶8 Relying on *State v. Petrak*, 198 Ariz. 260, 8 P.3d 1174 (App. 2000), Ritz argues this instruction failed to inform the jury that it must find Ritz intended to or could have used the weapon to "further the felony drug offense," and therefore "misled" the jurors regarding the correct legal principles they must apply to find him guilty. He claims this error is both fundamental and prejudicial, and requires us to reverse his conviction for weapons misconduct. But Ritz has failed to demonstrate prejudice, and his reliance on *Petrak* in this regard is misplaced.

¶9 Petrak was charged with possessing a deadly weapon during the commission of a felony—possession of marijuana and/or possession of drug paraphernalia. *Id.* ¶ 2. The state presented evidence that law enforcement had found drugs and paraphernalia in Petrak's house and a marijuana pipe and two weapons in his truck. *Id.* ¶ 4. Petrak argued the trial court erred by "failing to instruct the jury that, to convict, it had to find more than a mere temporal nexus between the guns and the drugs that formed the factual basis for the charge." *Id.* ¶ 1. He argued the state was required to show—and the jury was required to find—that he possessed the weapons "in relation to" his possession of marijuana, rather than just "at the same time." *Id.* ¶¶ 9, 13.

¶10 On appeal, we agreed, concluding that the weapons misconduct statute requires a showing of "more than a mere temporal nexus between the weapon and the crime alleged." *Id.* ¶ 19. Rather, the state must show that the defendant "intended to use or could have used the weapon to further the felony drug offense underlying the weapons misconduct charge," such as by showing "spatial proximity and accessibility of the weapon to the defendant and to the site of the drug offense." *Id.* Because the jury was not instructed that it must find such a nexus between the weapons and drugs, we concluded it was "misled regarding the legal principles to apply in determining guilt." *Id.* ¶ 20. Noting the jurors had expressed confusion regarding the proper legal standard for a weapons misconduct charge during deliberations and because "the evidence presented was not overwhelming," we concluded "[t]he jury might well have improperly convicted Petrak of weapons misconduct based on the guns in his truck and the drugs in his house." *Id.*

¶11 Such risks are not present here, and no reasonable jury could find a lack of a nexus between the guns and drugs which formed the basis for Ritz's weapons misconduct charge. Unlike Petrak, who kept "guns in his truck and the drugs in his house," *id.*, Ritz had both the guns and drugs in his vehicle. The items thus enjoyed "spatial proximity" and were accessible to Ritz, who easily

could have used the weapons to "further the felony drug offense."[2] *See id.* ¶ 19.

¶12 Moreover, evidence of both the spatial and temporal proximity between the drugs, weapons, and Ritz was overwhelming, negating any possible confusion as to the foundation for Ritz's weapons misconduct conviction. The police officer found one gun in the center console of the vehicle and another in the glove box; methamphetamine was found on the front- and rear- passenger floorboards, as well as in a bag that Ritz, the driver of the vehicle, was carrying. Ritz did not contest this evidence. Thus, even had the jury been instructed as Ritz proposes, it would have found the guns were used, available for use, or intended to further the drug offense. Ritz has not demonstrated he was prejudiced by the court's instruction, and the trial court therefore did not commit fundamental error.

Double Jeopardy Violation

¶13 Ritz argues, and the state concedes, that Ritz's convictions for two counts of possession of a dangerous drug violate the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and article 2, § 10 of the Arizona Constitution. Ritz urges us to vacate one of his convictions. We review de novo whether two convictions for the same conduct violate double jeopardy. *State v. Brown*, 217 Ariz. 617, ¶ 12, 177 P.3d 878, 882 (App. 2008). Ritz admits he did not object to these charges or convictions below and therefore accepts that we review only for fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607-08.

¶14 The Double Jeopardy Clause protects against multiple convictions and multiple sentences for the same offense. *State v. Powers*, 200 Ariz. 123, ¶ 5, 23 P.3d 668, 670 (App. 2001). "[W]hen a defendant is convicted more than once for the same offense, his double jeopardy rights are violated even when, as in the current

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[2]We further note that in *Petrak*, we reviewed for an abuse of the trial court's discretion, rather than for fundamental error. *Id.* ¶ 9.

case, he receives concurrent sentences." *State v. Brown*, 217 Ariz. 617, ¶ 13, 177 P.3d at 882 (emphasis omitted). A violation of the prohibition against double jeopardy constitutes fundamental, prejudicial error. *State v. Ortega*, 220 Ariz. 320, ¶ 7, 206 P.3d 769, 772 (App. 2008); *see also State v. McGill*, 213 Ariz. 147, ¶ 21, 140 P.3d 930, 936 (2006).

¶15 As noted above, Ritz was charged with transportation of a dangerous drug for sale and possession of a dangerous drug for sale. These charges stemmed from three packets of methamphetamine found in his vehicle: .896 grams that Ritz was carrying, 12.1 grams found on the front-passenger floorboard, and 40.18 grams found on the rear-passenger floorboard. The jury was instructed that possession of a dangerous drug was a lesser-included offense of each of the original offenses. Ritz was found guilty of the lesser-included offense for both charges and sentenced to concurrent terms of probation. Ritz contends that because the jury was not "required to differentiate among the three packages of meth[amphetamine] in determining whether [Ritz] was guilty" of the original charges or their lesser-included offenses, his convictions for possession of a dangerous drug "were based on the same conduct, in violation" of double jeopardy principles. We agree.

¶16 Although Officer Acevedo found three packages of methamphetamine in Ritz's car—two containing amounts consistent with drugs held for sale and one containing a personal use amount[3]—the prosecution did not distinguish between them when charging or trying Ritz. Ritz was charged with a single count each of possession of a dangerous drug for sale and transportation of a dangerous drug for sale. During its closing argument, the state, although noting the methamphetamine was found in three different places, simply argued that Ritz knowingly possessed and transported methamphetamine. And nothing in the record indicates

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[3] Detective Ewings testified that the package of methamphetamine containing 40.18 grams, as well as that containing 12.1 grams, were quantities likely held for sale, whereas the smaller amount Ritz was carrying was likely held for personal use.

the jury, in reaching its verdicts, differentiated between the different packages of methamphetamine. Thus, it appears Ritz was convicted twice for possessing the same corpus of drugs. As noted above, two convictions for the same conduct violates the prohibition against double jeopardy and constitutes fundamental, prejudicial error. *Brown*, 217 Ariz. 617, ¶ 13, 177 P.3d at 882; *Ortega*, 220 Ariz. 320, ¶ 7, 206 P.3d at 772. We therefore vacate Ritz's conviction for possession of a dangerous drug as a lesser-included offense of count two.

Financial Judgment and Order

¶17 Finally, Ritz urges us to correct the financial judgment and order to conform to the trial court's oral pronouncement at sentencing. During sentencing, the court imposed "a $1,000 fine, [with] an $830 surcharge thereon." In response to a request by Ritz, it then agreed to waive the $830 surcharge. These actions were accurately recorded in the court's minute entry. But the financial judgment and order, entered that same day, recorded the surcharge assessed against Ritz. Ritz urges that this discrepancy must be resolved to conform to the court's oral pronouncement and minute entry. We agree.

¶18 "Where there is a discrepancy between the oral sentence and the written judgment, the oral pronouncement of sentence controls." *State v. Hanson*, 138 Ariz. 296, 304-05, 674 P.2d 850, 858-59 (App. 1983). Generally, the proper procedure to correct this clerical error would have been for Ritz to file a post-trial motion with the trial court. *See* Ariz. R. Crim. P. 24.4 ("Clerical mistakes in judgments . . . may be corrected by the court at any time after such notice, if any, as the court orders."); *State v. Chavarria*, 116 Ariz. 401, 402, 569 P.2d 831, 832 (1977) ("When a party believes that there is a clerical error in the record, the proper procedure is to bring a motion in the trial court under . . . [R]ule 24.4, so that the trial court may determine if in fact there is an error in the record and, if so, order the error corrected."). However, we are authorized to "modify the action of the lower court and issue any necessary and appropriate orders." Ariz. R. Crim. P. 31.17(b) and cmt. (powers conferred on appellate court by Rule 31.17(b) include "affirming, reversing or modifying the judgment, correcting or reducing sentence and

affirming, modifying, or vacating any order made by the lower court").

¶19 The state urges that "[n]o correction is necessary" because Ritz's balance sheet and receipts with the trial court do not show that he owes the surcharge. Because the absence of the surcharge on the receipt does not ensure it will not be assessed against Ritz in the future, we order that the financial judgment and order be corrected to conform to the court's oral pronouncement and minute entry waiving the $830 surcharge.

Disposition

¶20 For the foregoing reasons, we vacate Ritz's conviction for possession of a dangerous drug as a lesser-included offense of count two and modify the financial judgment and order to conform to the trial court's oral pronouncement at sentencing. We affirm the court in all other respects.