IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

CATHERINE MARIE LODGE,
Appellant.

No. 2 CA-CR 2014-0110
Filed January 14, 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NOT FOR PUBLICATION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. CR20130764001
The Honorable Teresa Godoy, Judge Pro Tempore

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
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Counsel for Appellee

Lori J. Lefferts, Pima County Public Defender
By Michael J. Miller, Assistant Public Defender, Tucson
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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 Catherine Lodge appeals her convictions and sentences for various drugs and weapons charges. Lodge contends the trial court erred by allowing improper expert testimony as to her mental state, admitting evidence of titles of the documents found with the weapons and drugs, and failing to dismiss a duplicitous charge against her. For the following reasons, we affirm Lodge's convictions and sentences.

Factual and Procedural Background

¶2 We view the facts and all reasonable inferences therefrom in the light most favorable to sustaining Lodge's convictions and sentences. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). On February 6, 2013, Tucson police detectives Gerardo Diaz and Mark Ewings visited a residence in Tucson. The property was enclosed by a chain link fence and security cameras were installed outside the house. Lodge and her mother, L.M., answered the door. After the detectives explained they were conducting a narcotics investigation, both Lodge and L.M. granted them permission to enter the residence and "look around inside." Ewings saw things that "led [him] to believe that a further search might be appropriate," and the detectives obtained a search warrant.

¶3 When Ewings searched Lodge's room[1] later the same evening, he found weapons and ammunition, including a shotgun, rifle, pistol, and rifle magazine. He also found drugs—1.07 grams of marijuana and 16.1 grams of methamphetamine—and over fourteen items he identified as drug paraphernalia. Other items Ewings discovered included several thumb drives containing information about hiding or smuggling goods and a cellular telephone containing text messages related to drug sales.

¶4 Lodge was charged with possession of a dangerous drug for sale (methamphetamine), possession of marijuana weighing less than two pounds, possession of drug paraphernalia, and three counts of possession of a deadly weapon during the commission of a felony drug offense. After a jury trial, she was found guilty of all counts. The trial court imposed concurrent minimum sentences, the longest of which was five years' imprisonment. Lodge timely appealed.

Testimony Regarding Lodge's Mental State

¶5 Lodge first argues the trial court erred by permitting Ewings to testify over her objection that in his opinion, the methamphetamine found in Lodge's room was possessed for sale. She claims this was improper opinion testimony because it "[told] the jury what [her] mental state was and how to decide the [ultimate] issue" and thus violated Rule 704(b), Ariz. R. Evid. We review for an abuse of discretion the court's evidentiary rulings. *State v. Davolt*, 207 Ariz. 191, ¶ 60, 84 P.3d 456, 473 (2004).

¶6 Expert testimony is admissible if it "will help the trier of fact to understand the evidence or to determine a fact in issue." Ariz. R. Evid. 702(a). An expert may testify to an opinion that "embraces an ultimate issue" to be decided by the trier of fact if the

[1]Lodge contended that she shared the room with A.Q., her boyfriend. A.Q. kept clothes and personal possessions in the room, and he had received mail at the residence. The state did not challenge this contention.

testimony is otherwise admissible, but a witness is not permitted to tell the jury how to decide a case. Ariz. R. Evid. 704(a) & cmt. An expert witness is prohibited from testifying "about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged." Ariz. R. Evid. 704(b).

¶7 On the second day of trial, Ewings testified without objection that possessing more than seven grams of methamphetamine, packaging the methamphetamine in multiple baggies, selling and keeping methamphetamine with another person, and keeping the methamphetamine in a safe location were all indicators that the methamphetamine is being held for sale. He further testified it was common for methamphetamine sellers to keep weapons in close proximity to the drugs to protect against theft and home invasions. The prosecutor then asked Ewings whether he had "developed an opinion about whether the methamphetamine discovered in this case was possessed for sale." Lodge objected on the ground that the question was an "[i]mproper opinion." The trial court overruled the objection, and Ewings stated:

> I believe that this is possessed for sale, taking into account all of the factors in the investigation. From, you know, text messages, from the packaging, from the paraphernalia that was located, I believe any amount, this is something I believe is possessed for sale, the ledgers, things like that.

Lodge did not object further.

¶8 Prior to deliberations, the trial court instructed the jury that "[t]he crime of possession of a dangerous drug requires proof of the following: One, the defendant knowingly possessed a dangerous drug; and Two, the substance was, in fact, a dangerous drug." It also instructed the jury that possession of a dangerous drug for sale had the added element that "the [dangerous drug] possession was for the purpose of sale." The court further explained that "[p]ossess means knowingly to have physical possession or

otherwise to exercise dominion or control over property." As noted above, Lodge was found guilty of both possession of marijuana and possession of methamphetamine for sale.

¶9 On appeal, Lodge argues that by telling "the jury that, in his opinion, the methamphetamine was possessed for sale," Ewings told them that "the possessor had a mental state of 'knowing.'" This testimony, Lodge urges, "violated the prohibition on testimony about mental state because possession requires the mental state of 'knowing.'"

¶10 But Ewings did not specify that Lodge herself, rather than her boyfriend or her mother—both of whom she attempted to implicate at trial—possessed the methamphetamine for sale. Nor did he state that Lodge knew the methamphetamine was for sale. Rather, in response to a question regarding the purpose for which the drugs might have been kept in the room, Ewings testified that the manner in which the drugs were kept and circumstances of their storage indicated they were likely meant for sale—a factual assertion that would assist the jury in determining whether the drugs were intended for personal use or sale. *See* Ariz. R. Evid. 702(a). Such testimony has long been deemed admissible by Arizona courts.[2] *See State v. Keener*, 110 Ariz. 462, 466, 520 P.2d 510, 514 (1974) (no abuse of discretion in permitting expert law enforcement witness to testify that, in his opinion, "the quantity and purity of the drugs possessed by the [defendant] indicated that they were for sale rather than personal possession."); *accord State v. Fornof*, 218 Ariz. 74, ¶ 21, 179 P.3d 954, 959-60 (App. 2008); *State v. Carreon*, 151 Ariz. 615, 617, 729 P.2d 969, 971 (App. 1986) ("A police officer's expert testimony concerning whether drugs were possessed for sale has long been

[2]In light of our conclusion that Ewings did not testify as to Lodge's mental state, we do not address Lodge's contention that the enactment of Rule 704(b)—prohibiting expert testimony regarding a defendant's mental state—alters the holdings of these cases. *See* Rule 704(b) (effective Jan. 1, 2012); *see also* Rule 704(b) cmt. (addition of Rule 704(b) "is considered to be consistent with current Arizona law" and "[n]o change in current practice is intended").

admissible in this state" and "will definitely" help trier of fact understand evidence or determine fact in issue). We conclude that Ewings's testimony was not improper, and the trial court therefore did not err by failing to exclude it.

Testimony Regarding Document Titles

¶11 Lodge argues the trial court erred when it allowed testimony regarding the titles of the documents found on the thumb drives in the safe over her objection. The documents had titles such as "Secret Hiding Places," "U.S. Army's Special Forces Caching Techniques," "Hiding and Storing Stuff Safely," "Sneak it Through—Smuggling Made Easier," "Weapons Caching: A Down-to-Earth Approach to Beating the Government Gun Grab," and "The Construction of Secret Hiding Places." On the first day of trial, Lodge objected to the anticipated testimony, arguing that the titles were hearsay, "more prejudicial than probative," and not relevant. The court found that "the location [of the thumb drives], together with the totality of the circumstances, make [the titles] relevant concerning whether or not this particular methamphetamine . . . was possessed for sale versus some other purpose." The court further determined that the titles were "being offered for a proper purpose" and were not hearsay, and that "the probative value of . . . the names of the documents . . . is not outweighed by the danger of unfair prejudice." After Ewings testified as to the titles of the documents, Lodge renewed her objection, which the court again overruled.

¶12 Lodge argues the trial court should have excluded the testimony regarding the document titles because it was unfairly prejudicial. "We review a trial court's evidentiary decisions for an abuse of discretion, giving deference to its determination on relevance and unfair prejudice." *State v. Smith*, 215 Ariz. 221, ¶ 48, 159 P.3d 531, 542 (2007) (citations omitted). Relevant evidence may be excluded "if its probative value is substantially outweighed by a danger of . . . unfair prejudice." Ariz. R. Evid. 403. "Unfair prejudice results if the evidence has an undue tendency to suggest decision on an improper basis, such as emotion, sympathy, or horror," but "[n]ot all harmful evidence . . . is unfairly prejudicial." *State v. Mott*, 187 Ariz. 536, 545-46, 931 P.2d 1046, 1055-56 (1997).

Because "[t]he trial court is in the best position to balance the probative value of challenged evidence against its potential for unfair prejudice . . . it has broad discretion in deciding the admissibility" of the evidence. *State v. Harrison*, 195 Ariz. 28, ¶ 21, 985 P.2d 513, 518 (App. 1998).

¶13 Lodge argues the titles of the documents "could be taken to imply that [she] was involved in smuggling or had a cache of drugs someplace from which she brought smaller quantities to the safe, creating unfair prejudice." But the titles of the documents had probative value because they suggested an interest in hiding items, thereby demonstrating a consciousness of guilt. And as the trial court noted, the evidence was "relevant" to whether the methamphetamine found in the safe was "possessed for sale versus some other purpose." The danger that the jury would assume from the titles of the documents that Lodge was involved in smuggling or had a cache of drugs stored elsewhere was minimal, particularly as she was not charged with either offense.

¶14 Moreover, the titles of the documents were not of an inflammatory nature and were unlikely to "incite the jury's emotions." *See State v. Routhier*, 137 Ariz. 90, 98, 669 P.2d 68, 76 (1983). The trial court did not abuse its discretion in concluding that the probative value of the titles of the documents was not outweighed by the danger of unfair prejudice.

¶15 Lodge also argues the trial court should have excluded the document titles as other acts evidence pursuant to Rule 404(b). She concedes she did not object below to the evidence on this basis. 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 fair trial.'" *Id.* ¶ 19, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). "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.

¶16 Lodge identifies fundamental error as the proper standard of review, but she does not argue that the alleged error was either fundamental or prejudicial. Accordingly, she has waived that argument. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (failure to argue fundamental error waives argument on appeal).

Duplicitous Indictment

¶17 Lodge argues the trial court erred by denying her motion to dismiss count five of the indictment—possession of drug paraphernalia—as duplicitous. Noting that "[t]he indictment here alleges possession of [multiple] kinds of paraphernalia," Lodge claims she was denied the right to a unanimous jury verdict because "[t]he Court cannot put itself in the jurors' shoes and decide which evidence they found convincing, and therefore what verdict they reached." She urges us to reverse her conviction for possession of drug paraphernalia.

¶18 We review the trial court's denial of a motion to dismiss for an abuse of discretion, but duplicity is a question of law that we review de novo. *See State v. Ramsey*, 211 Ariz. 529, ¶ 5, 124 P.3d 756, 759 (App. 2005). We need not reverse Lodge's conviction if she did not suffer prejudice from the charge. *See State v. Petrak*, 198 Ariz. 260, ¶ 28, 8 P.3d 1174, 1182 (App. 2000).

¶19 Count five of the indictment charged Lodge with possession of "drug paraphernalia, to wit: baggies, bong, grinder, scales, pipes, in violation of A.R.S. § 13-3415(A)." Before trial, Lodge moved to dismiss this count as "unconstitutionally duplicitous" because it charged "two or more distinct and separate offenses in a single count." The state responded to Lodge's motion, urging that "[e]ach of the items listed in Count Five of the indictment is drug paraphernalia. All of the . . . items were discovered by the detective at approximately the same time, on the same date, as part of the same investigation." The state maintained that each of Lodge's acts of possession were "part of a single criminal transaction," and were "based on the same conduct and are connected together in their commission." It urged that Lodge "is not susceptible to double

jeopardy or a conviction by less than a unanimous jury verdict, as the State will be required to prove every item listed in the [c]ount."

¶20 After a hearing, the trial court denied Lodge's motion, concluding "the Indictment, as it relates to Count Five, is not duplicitous." At the close of trial, the jury was instructed on the statutory elements of the crime of possession of drug paraphernalia. The jury subsequently found Lodge guilty "of the offense of possession of drug paraphernalia as alleged in Count Five of the Indictment."

¶21 A "duplicitous indictment" is one that, on its face, alleges multiple crimes within one count.[3] *State v. Paredes–Solano*, 223 Ariz. 284, ¶ 4, 222 P.3d 900, 903 (App. 2009). "Depending upon the context, [a duplicitous indictment] can deprive the defendant of 'adequate notice of the charge to be defended,' create the 'hazard of a non-unanimous jury verdict,' or make it impossible to precisely plead 'prior jeopardy [ ] in the event of a later prosecution.'"[4] *State v. Klokic*, 219 Ariz. 241, ¶ 12, 196 P.3d 844, 847 (App. 2008), *quoting*

[3] In contrast to a duplicitous indictment, a "duplicitous charge" occurs when the charging document alleges a single criminal act, but the state presents evidence of multiple criminal acts to prove a defendant's guilt. *See State v. Klokic*, 219 Ariz. 241, ¶ 12, 196 P.3d 844, 847 (App. 2008). Although Lodge uses the terms interchangeably, we construe her argument as a challenge to a duplicitous indictment. *See State v. Butler*, 230 Ariz. 465, ¶ 13, 286 P.3d 1074, 1079 (App. 2012) ("A 'duplicitous charge' is one that alleges multiple crimes due to the presentation of evidence at trial, whereas a 'duplicitous indictment' is one that, on its face, alleges multiple crimes within one count.").

[4]Lodge does not allege that she did not have notice of the charges or that she was at risk for double jeopardy; rather, her argument centers solely on the risk of a non-unanimous jury verdict. We therefore do not address any of the other risks attendant to duplicitous indictments. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (failure to argue claim on appeal constitutes waiver).

State v. Davis, 206 Ariz. 377, ¶ 54, 79 P.3d 64, 76 (2003) (alteration in *Klokic*); *see also Petrak*, 198 Ariz. 260, ¶ 23, 8 P.3d at 1180-81.

¶22 We conclude that even if the charge in count five was duplicitous, Lodge was not prejudiced. In *State v. Schroeder*, 167 Ariz. 47, 52–53, 804 P.2d 776, 781–82 (App. 1990), we held that even though the evidence presented at trial showed Schroeder had committed multiple acts of sexual abuse rather than the single act charged in the indictment,[5] the introduction of those uncharged acts did not prejudice the defendant. In that case, Schroeder's granddaughter testified he had sexually abused her multiple times over the course of one evening. *Id.* at 48-49, 804 P.2d at 777-78. Schroeder was charged with and convicted of one count of sexual abuse. *Id.* at 48, 804 P.2d at 777. After determining the defendant had adequate notice of the charges and was not at risk of double jeopardy, we concluded he was not prejudiced because the events occurred "over a relatively short period of time during one evening," all of the acts described by the victim were of the same nature and type, and the defendant offered the same defense to each of the acts, which was that they did not occur. *Id.* at 53, 804 P.2d at 782. Noting that "the jury was left with only one issue—who was the more credible of the only two witnesses to the alleged acts"—we concluded that the jury's verdict "implies that it did not believe the only defense offered." *Id.*

¶23 As in *Schroeder*, the multiple acts underlying Lodge's paraphernalia charge were discovered "over a relatively short period of time" during the search of Lodge's bedroom on February 6. On that date, Ewings found two small methamphetamine bongs, a digital scale, plastic tubing commonly used to "vaporize" drugs, a

[5]Although *Schroeder* seemingly discussed a duplicitous charge, rather than a duplicitous indictment, 167 Ariz. at 51 & n.4, 804 P.2d at 780 & 781 n.4, we see no reason why our prejudice analysis there should not apply equally to the purportedly duplicitous indictment in this case, *see Klokic*, 219 Ariz. 241, ¶ 12, 196 P.3d at 847 (duplicitous charges present same hazards as duplicitous indictments).

plastic scale, and baggies. Ewings testified that in his training and experience, these items likely were used to weigh and repackage methamphetamine. He also found a spoon with residue, weights for calibrating scales, and a lighter, which in his opinion were "paraphernalia common or consistent with meth use." Ewings found additional items he deemed consistent with drug paraphernalia in Lodge's room, including a marijuana grinder, a marijuana bong, zigzag cigarette papers, a cigarette roller, a lighter, and a scale. These items were stored in Lodge's room along with the weapons, ammunition, methamphetamine, and marijuana that provided the bases for counts one through four.

¶24 Also, as in *Schroeder*, Lodge asserted only one defense to the charges: the items belonged either to A.Q. or L.M. and she was "mere[ly] presen[t]." Lodge requested and was granted a jury instruction to this effect, citing the third-party culpability defense she was "vigorously mounting." And in her arguments, Lodge encouraged the jury to find that Lodge's "proximity" to the items found in the room was "not good enough to convict" her and to conclude the evidence "create[d] a reasonable doubt that somebody else committed this offense." Lodge maintained that she was "not guilty because she was merely present." This was her sole defense with respect to all of the items alleged to be paraphernalia, as well as the drugs and weapons.

¶25 The jury thus had only one question to determine: whether Lodge or someone else knowingly possessed the items found in her room. By finding her guilty of possessing all items alleged in the indictment, including the drugs and weapons, the jury made clear that it "did not believe the only defense [Lodge] offered." *See Schroeder*, 167 Ariz. at 53, 804 P.2d at 782. Lodge therefore was not prejudiced by count five of the indictment.

¶26 Lodge argues the paraphernalia "included scales and baggies that could be used in the sale of methamphetamine, and a bong that could be used in connection with the personal use of marijuana." Thus, she urges, "the evidence demonstrated kinds of paraphernalia that were not charged in the indictment" and that, "taken as a whole, [the indictment] raises the possibility that some

jurors could determine that one item of paraphernalia was used to violate one provision of chapter 34 and other jurors that it could find the same item was used to violate another."

¶27 But Lodge's conviction for violating § 13-3415(A) is neither tangential to nor reliant upon her other drug charges. Rather, possession of drug paraphernalia is a distinct statutory offense that required the state to prove Lodge "use[d], or [possessed] with intent to use, drug paraphernalia to . . . pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body" an illegal drug, and that the item was drug paraphernalia.[6] § 13-3415(A). The statute does not require that a charge of possession of drug paraphernalia stem from or co-exist with other drug charges. All that is required is that the state establish some use in violation of § 13-3415(A). The trial court did not err by denying Lodge's motion to dismiss count five of the indictment.

Disposition

¶28 For the foregoing reasons, we affirm Lodge's convictions and sentences.

[6]Drug paraphernalia includes all equipment, products, and materials of any kind that are used, intended for use, or designed for use, in part, in preparing, packaging, repackaging, storing, containing, or concealing an illegal drug. § 13–3415(F)(2). The statute specifically lists scales, containers for packing, storing, or concealing drugs, pipes, and "[k]its used, intended for use or designed for use in . . . processing or preparing drugs." § 13-3415(F)(2)(b), (e), (i), and (j).