IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

TROY JACK BRIGGS,
Appellant.

No. 2 CA-CR 2014-0333
Filed May 13, 2015

Appeal from the Superior Court in Pima County
No. CR20130176001
The Honorable Jane L. Eikleberry, Judge

AFFIRMED

COUNSEL

Barton & Storts, P.C., Tucson
By Brick P. Storts, III
Counsel for Appellant

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Chief Judge Eckerstrom and Presiding Judge Miller concurred.

E S P I N O S A, Judge:

¶1 Following a jury trial, appellant Troy Briggs was convicted of possession of methamphetamine, possession of cocaine base, and possession of drug paraphernalia. The trial court sentenced him to an enhanced, "partially mitigated," eight-year term of imprisonment on the methamphetamine count and suspended the imposition of sentence on the remaining counts, placing Briggs on concurrent, three-year terms of probation to begin upon his release from prison. Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), stating he has reviewed the record and has found no "arguable legal issues to raise on appeal." Counsel has asked us to search the record for fundamental error.

¶2 Viewed in the light most favorable to sustaining the verdict, the evidence presented at trial was sufficient to support the jury's finding of guilt. *See State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999). In January 2013, methamphetamine, "crack" cocaine, and paraphernalia, specifically a scale and plastic bags, were found in Briggs's home. We further conclude the sentence imposed is within the statutory limit. *See* A.R.S. §§ 13-703(C), (J); 13-901.01; 13-902(3), (4); 13-3407(A)(1); 13-3408(A)(1); 13-3415(A).

¶3 In a supplemental pro se brief, however, Briggs raises several claims of error. He first maintains his speedy trial rights were violated because he was not tried within 180 days of his arraignment, as required by Rule 8.2, Ariz. R. Crim. P. But Rule 8.5, Ariz. R. Crim. P., allows the court to grant a continuance to extend

the time periods set forth in Rule 8.2 under certain circumstances. In this case, Briggs moved for continuances in August 2013, January 2014, and March 2014. He has not argued or established that the trial court erred in granting those motions, nor has he shown that, in light of them, his trial was not timely held. The claim therefore fails.

¶4 Briggs also contends, to the extent we understand his argument, that the indictment against him was implicitly amended, and duplicity was created, when the trial court instructed the jury on lesser-included offenses. Briggs was initially charged with both possession of cocaine base for sale and simple possession of the drug. The state dismissed the simple possession count before trial, noting the charges were "duplicitous." At the close of trial, the court instructed the jury it could consider possession of methamphetamine and possession of cocaine base as lesser-included offenses of the possession for sale counts if it found Briggs not guilty of or could not reach a verdict on the greater sale offenses. Briggs apparently contends that this instruction implicitly amended the indictment or created a duplicitous charge.

¶5 "A duplicitous charge exists '[w]hen the text of an indictment refers only to one criminal act, but multiple alleged criminal acts are introduced to prove the charge.'" *State v. Paredes-Solano*, 223 Ariz. 284, ¶ 4, 222 P.3d 900, 903 (App. 2009), *quoting State v. Klokic*, 219 Ariz. 241, ¶ 12, 196 P.3d 844, 847 (App. 2008). This differs from a "duplicitous indictment, which 'charges two or more distinct and separate offenses in a single count.'" *Id.*, *quoting Klokic*, 219 Ariz. 241, ¶ 10, 196 P.3d at 846. But neither a duplicitous charge nor a duplicitous indictment is present here. The indictment charged Briggs with the offense of possession of each of the drugs for sale in a single count, based on a single action. The jury instruction properly allowed the jury, if it did not find Briggs guilty of the greater offense, to consider his guilt on the lesser-included offense. *See State v. LeBlanc*, 186 Ariz. 437, 438, 924 P.2d 441, 442 (1996) ("jury may deliberate on a lesser offense if it either (1) finds the defendant not guilty on the greater charge, or (2) after reasonable efforts cannot agree whether to acquit or convict on that charge"). Indeed, Briggs's defense was that he was merely guilty of the lesser-included offense. Thus, there was no error, let alone fundamental

error, in relation to the indictment or the jury instructions in this regard. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005).

¶6 Briggs next maintains the court erred in relation to enforcing its pretrial ruling relating to his prior drug acts and police surveillance of his home. He alleges the prosecutor continuously questioned police witnesses in violation of the court's order and yet the court did not limit the testimony. According to Briggs, the court ordered the state "to not solicit responses nor directly introduce any reference to surveillance being conducted of [his] residence." The transcript of the court's ruling, however, shows that it precluded the state from presenting any evidence about previous drug sales, but specifically allowed the state "to introduce evidence that they had the defendant under surveillance when they made certain observations." The opening statement and testimony Briggs identifies are consistent with that ruling.

¶7 Finally, in a rather confusing argument,[1] Briggs apparently contends the trial court improperly enhanced his sentence. Briggs was sentenced as a category three repetitive offender based on his convictions for aggravated driving under the influence (DUI), committed in January 1997, and fraudulent schemes and artifice[s], a class two felony committed in December 2002. The court imposed three years imprisonment on the latter charge. Under A.R.S. § 13-105(22)(a)(iv), any conviction involving aggravated DUI is a historical prior felony conviction. *See also State v. Stefanovich*, 232 Ariz. 154, ¶ 8, 302 P.3d 679, 681 (App. 2013) (defendant "does not and cannot have a 'vested' right that his previous convictions could not be used to increase his punishment for new criminal acts"). Likewise, a class two felony committed within the ten years before the present offense, excluding time incarcerated, is a historical prior felony conviction. § 13-105(22)(b). We therefore cannot say the court erred in imposing an enhanced sentence.

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[1]Briggs also appears to assert that he received ineffective assistance of counsel in relation to a plea offer. Such a claim may not be raised on appeal. *State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002).

¶8 Additionally, pursuant to our obligation under *Anders*, we have reviewed the record for fundamental, reversible error and have found none. Accordingly, Briggs's convictions and sentences are affirmed.