IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ERIC KYLE BRADLEY,
Appellant.

No. 2 CA-CR 2015-0296
Filed August 31, 2016

Appeal from the Superior Court in Pinal County
No. S1100CR201300492
The Honorable Bradley M. Soos, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Mariette Ambri, Assistant Attorney General, Tucson
Counsel for Appellee

Harriette P. Levitt, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

E C K E R S T R O M, Chief Judge:

¶1 Following a jury trial, appellant Eric Bradley was convicted of transferring a dangerous drug (methamphetamine) and sentenced to an enhanced, partially aggravated prison term of sixteen years. On appeal, he challenges the admission of other-act evidence and the denial of a jury instruction on a lesser offense. We affirm for the reasons that follow.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to upholding the conviction. *State v. Pecina*, 184 Ariz. 238, 239 n.1, 908 P.2d 52, 53 n.1 (App. 1995). In March 2013, a federal undercover agent was working with Bradley and Bradley's partner, Traris Douglas, to transport undocumented aliens past border patrol checkpoints. After transporting the first group of entrants, Bradley asked the agent whether he wanted some methamphetamine. Bradley explained that he could take the agent to Douglas's house to get the drug. The agent declined the offer.

¶3 Several days later, when the agent insisted on being paid for his smuggling activities, Bradley agreed that "they could pay [the agent] with some of the methamphetamine that they spoke about . . . previous[ly]." The agent met Bradley and Douglas outside Douglas's house in the Eloy area. Bradley went inside and placed the methamphetamine into a plastic bag held by Douglas, who then closed and delivered it to the waiting agent. Douglas told the agent the methamphetamine was pure, so he "would . . . be able to make about $80 off of it." Federal agents then turned the drug over to local officials.

¶4 When the federal agents interviewed Bradley after his arrest, he initially denied being involved in human smuggling. After they revealed to Bradley that he had been working with an undercover agent, he claimed that "everything was . . . Douglas's idea and that [Douglas] was in charge" of the operation. Bradley also offered to provide information concerning the methamphetamine trade in and around the city of Eloy. Douglas, in contrast, stated that Bradley was "the boss" of the human-smuggling operation.

¶5 At trial, Bradley challenged the agent's credibility about the methamphetamine transaction at the residence. Bradley also argued that he had been merely present at the house and that Douglas had been the boss of the operation, making him solely responsible for the transfer of the drug. The jury found Bradley guilty, as noted above, and this appeal followed the imposition of sentence.

Admission of Evidence

¶6 Bradley first contends the trial court committed reversible error by admitting under Rule 404(b), Ariz. R. Evid., "detailed evidence" of his involvement in the human-smuggling operation. As we understand his argument, he acknowledges that the undercover agent's participation in the human-smuggling operation and payment with methamphetamine constitutes "evidence regarding the crime for which [Bradley] was actually on trial."

¶7 Bradley maintains, however, that the testimony of two additional federal agents was both irrelevant to this charge and unduly prejudicial. Specifically, he challenges the evidence that (1) after receiving the methamphetamine, the undercover agent was told to pick up another load of undocumented aliens from J.B.; (2) federal agents subsequently apprehended J.B. and found Bradley's contact information—but not Douglas's information—in J.B.'s cell phone; (3) J.B. then called Bradley at an agent's request to discuss the latest failure to transport the undocumented aliens; and (4) Bradley made statements in his interview with the agents

regarding his involvement with the human-smuggling operation and his knowledge of the methamphetamine trade.

¶8 Under any standard of appellate review, an appellant carries the burden of showing that the trial court erred. *See State v. Diaz*, 223 Ariz. 358, ¶ 11, 224 P.3d 174, 176 (2010); *State v. Inzunza*, 234 Ariz. 78, ¶ 28, 316 P.3d 1266, 1274 (App. 2014). To do so, an appellant's opening brief must identify the legal issues presented for review and must develop an argument for each contention in accordance with Rule 31.13(c)(1)(v) and (vi), Ariz. R. Crim. P. In light of this burden, we need not decide whether Bradley preserved below all the arguments he now presents on appeal. Assuming, as he contends, that the trial court admitted the challenged evidence under Rule 404(b), we conclude he has failed to demonstrate this ruling was erroneous.

¶9 Under Rule 404(b), evidence of other crimes, wrongs, or acts "is admissible if relevant and admitted for a proper purpose, such as to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *State v. Beasley*, 205 Ariz. 334, ¶ 14, 70 P.3d 463, 466 (App. 2003). Evidence of other acts can be admitted, for example, to show that a defendant "planned to and would act together" with a codefendant to commit the charged offense, thereby rebutting a mere presence defense. *State v. Maturana*, 180 Ariz. 126, 128, 130, 882 P.2d 933, 935, 937 (1994). Other-act evidence is always subject to the balancing test set forth in Rule 403, Ariz. R. Evid. *State v. Leteve*, 237 Ariz. 516, ¶ 11, 354 P.3d 393, 399 (2015). "Because a trial court is best able to balance the probative value versus the prejudicial effect of 'other crimes, wrongs, or acts' evidence, it is invested with considerable discretion in deciding whether to admit such evidence." *State v. Via*, 146 Ariz. 108, 122, 704 P.2d 238, 252 (1985).

¶10 Here, the state correctly argued below that the other-act evidence was appropriate to rebut Bradley's mere presence defense. Bradley's involvement with human smuggling and his unique relationships with other individuals involved in that activity made it more likely, as Douglas asserted, that Bradley had directed their smuggling operation and had participated in the transfer of the methamphetamine. Similarly, Bradley's general knowledge of

methamphetamine dealers in Eloy was relevant insofar as it made it more likely he would transfer this drug as payment for a smuggling debt. In sum, because the challenged evidence tended to show that Bradley had a motive and an intent to transfer the methamphetamine, it was admissible to rebut his mere presence defense placing criminal responsibility solely on Douglas. *See Maturana*, 180 Ariz. at 128, 130, 882 P.2d at 935, 937.

¶11 Given that the central dispute in this case concerned Bradley's role in the smuggling organization and the related transfer of methamphetamine, the challenged evidence was relevant and highly probative. Moreover, the record reflects that the trial court considered and attempted to reduce the risk of unfair prejudice this evidence posed. The court specifically asked potential jurors during voir dire whether they could be fair and impartial in a case that concerned methamphetamine and the smuggling of undocumented aliens. The court also invited Bradley to craft an appropriate limiting instruction for the other-act evidence. On this record, we cannot say the trial court abused its broad discretion in implicitly concluding the probative value of the challenged evidence compared to the risk of unfair prejudice warranted admission of the other acts. *See* Ariz. R. Evid. 403; *State v. Salazar*, 181 Ariz. 87, 91-92, 887 P.2d 617, 621-22 (App. 1994); *see also Beasley*, 205 Ariz. 334, ¶ 15, 70 P.3d at 466 (noting "explicit findings" balancing Rule 403 factors are not always necessary).

Jury Instruction

¶12 Bradley next challenges the trial court's rejection of his proposed jury instruction for possession of a dangerous drug. The court refused the instruction on the ground that possessing a dangerous drug under A.R.S. § 13-3407(A)(1) is not a lesser included offense of transferring a dangerous drug under § 13-3407(A)(7). We review this question of law de novo, *see State v. Breed*, 230 Ariz. 462, ¶ 4, 286 P.3d 806, 806 (App. 2012), and agree with the trial court's determination.

¶13 Upon a proper request, Rule 23.3, Ariz. R. Crim. P., requires a trial court to submit to the jury all offenses "necessarily included" in the crime charged. An offense is necessarily included if

(1) it is a lesser included offense of the crime charged and (2) the evidence supports an instruction on the lesser offense. *See State v. Geeslin*, 223 Ariz. 553, ¶ 7, 225 P.3d 1129, 1130 (2010); *State v. Wall*, 212 Ariz. 1, ¶ 14, 126 P.3d 148, 150 (2006). "The test for whether an offense is 'lesser-included' is whether it is, by its very nature, always a constituent part of the greater offense, or whether the charging document describes the lesser offense even though it does not always make up a constituent part of the greater offense." *State v. Robles*, 213 Ariz. 268, ¶ 5, 141 P.3d 748, 750-51 (App. 2006), *quoting State v. Chabolla-Hinojosa*, 192 Ariz. 360, ¶ 12, 965 P.2d 94, 97 (App. 1998); *accord State v. Gooch*, 139 Ariz. 365, 366, 678 P.2d 946, 947 (1984). The latter analysis is called the "'charging document[]' test" and is distinguished from the "'elements' test." *State v. Larson*, 222 Ariz. 341, ¶ 7, 214 P.3d 429, 431 (App. 2009); *see also State v. Hanks*, 58 Ariz. 77, 81, 118 P.2d 71, 72-73 (1941) (noting longstanding practice of construing lesser included offenses by reference to charging document).

¶14 Under the elements test, an offense is lesser included only if it is "composed solely of some but not all of the elements of the greater crime so that it is impossible to have committed the crime charged without having committed the lesser one." *State v. Celaya*, 135 Ariz. 248, 251, 660 P.2d 849, 852 (1983). The analysis focuses exclusively on the statutory elements of the crimes. *State v. Laffoon*, 125 Ariz. 484, 487, 610 P.2d 1045, 1048 (1980). Section 13-3407(A)(7) makes it a crime to knowingly "[t]ransport for sale, import into this state or offer to transport for sale or import into this state, sell, transfer or offer to sell or transfer a dangerous drug." The subsection can be violated, in other words, by a certain type of "offer" regarding a dangerous drug. *Id.* As the state correctly points out, a person can offer to sell or transfer a dangerous drug without also possessing that drug. By contrast, possession is an essential element of the offense set forth in § 13-3407(A)(1). *State v. Cheramie*, 218 Ariz. 447, ¶ 10, 189 P.3d 374, 376 (2008). Hence, according to the elements test, possessing a dangerous drug under subsection (A)(1) is not a lesser included offense of the crime set forth in § 13-3407(A)(7).

¶15 The charging document test likewise did not support the proffered instruction here. Bradley's indictment alleged he had violated § 13-3407(A)(7) by "transferring . . . or offering to sell or transfer a dangerous drug." Under this description of the offense, which included "offering" to transfer the drug, the crime could be committed without necessarily possessing methamphetamine. *See Gooch*, 139 Ariz. at 366-67, 678 P.2d at 947-48. Thus, possession was not a lesser included offense of the transferring charge, and the trial court properly denied Bradley's requested instruction.

¶16 Although Bradley relied on *Cheramie* below, that case is distinguishable. There, our supreme court held that "possession of a dangerous drug" is a lesser included offense of "*transportation* for sale of a dangerous drug." *Cheramie*, 218 Ariz. 447, ¶ 1, 189 P.3d at 448 (emphasis added). Notably, the defendant's charging document in that case had narrowed the offense under § 13-3407(A)(7) by exclusively describing the criminal conduct as "transportation for sale." *Cheramie*, 218 Ariz. 447, ¶ 3, 189 P.3d at 448. Our supreme court considered only this method of committing the offense when it compared the elements of the respective crimes, implicitly using the charging document test to conduct its legal analysis. *See id.* ¶¶ 3, 6, 10. *Cheramie* therefore does not support the broader proposition that all offenses set forth in § 13-3407(A)(7) include possession as a lesser offense.

Disposition

¶17 For the foregoing reasons, we affirm Bradley's conviction and sentence.