IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

KEVIN EDWIN ANDERSON,
Appellant.

No. 2 CA-CR 2016-0108
Filed November 7, 2016

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NOT FOR PUBLICATION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. CR20131966001
The Honorable Christopher C. Browning, Judge

AFFIRMED IN PART; VACATED IN PART

COUNSEL

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Counsel for Appellee

Steven R. Sonenberg, Pima County Public Defender
By Sarah L. Mayhew, Assistant Public Defender, Tucson
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MEMORANDUM DECISION

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

V Á S Q U E Z, Presiding Judge:

¶1 After a jury trial, Kevin Anderson was convicted of two counts of possession of a dangerous drug, possession of two or more pounds of marijuana for sale, possession of drug paraphernalia, and use of a building for the sale or manufacture of a dangerous or narcotic drug. The trial court sentenced Anderson to 3.5 years' imprisonment, followed by concurrent terms of probation. The dispositive issue on appeal is whether Anderson's conviction for use of a building for the sale or manufacture of any dangerous or narcotic drug must be vacated because the court erred by instructing the jury that marijuana is a narcotic drug. For the following reasons, we vacate that conviction and sentence, but otherwise affirm.[1]

Factual and Procedural Background

¶2 We view the facts and all reasonable inferences therefrom in the light most favorable to upholding Anderson's convictions. *See State v. Allen*, 235 Ariz. 72, ¶ 2, 326 P.3d 339, 341 (App. 2014). In April 2013, a Tucson Police officer searched a storage facility with his drug-detection dog in response to a tip. The dog alerted to a particular storage unit, but before officers could conduct a search, Anderson arrived at the storage facility and told the officers that he "dealt [marijuana] out of the storage unit." He stated that they would find five pounds of marijuana inside.

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[1] Because we vacate Anderson's conviction under A.R.S. § 13-3421(A), we need not address his other argument, that insufficient evidence supported the conviction. Anderson also withdrew his remaining argument, that the grand jury's indictment was amended illegally.

¶3 In the storage unit, officers found 7.5 pounds of marijuana, approximately $1,115 in cash, a cellular telephone receipt bearing Anderson's name, and a locked safe. Anderson provided the combination to open the safe, which contained approximately one pound of methamphetamine. The officers also searched Anderson's home, where they found a security camera outside, more marijuana, six baggies of methamphetamine, an electronic scale, a ledger, and a pipe for methamphetamine.

¶4 A grand jury indicted Anderson for two counts of possession of a dangerous drug for sale (methamphetamine), possession of marijuana for sale, possession of drug paraphernalia, and use of a building for the sale or manufacture of a dangerous or narcotic drug.[2] The jury found Anderson not guilty of the two counts of possession of a dangerous drug for sale (methamphetamine) but guilty of the lesser-included offenses of possession of a dangerous drug. The jury also found Anderson guilty of the remaining charges: possession of two or more pounds of marijuana for sale, possession of drug paraphernalia, and use of a building for the sale or manufacture of a dangerous or narcotic drug. The trial court sentenced him as described above, and this appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

¶5 Anderson argues the trial court erred by instructing the jury that marijuana is a narcotic drug. He thus maintains his conviction for use of a building for the sale or manufacture of dangerous or narcotic drugs must be vacated. Because Anderson did not object below to the trial court's instruction, we review for fundamental, prejudicial error. *State v. Ruiz*, 236 Ariz. 317, ¶ 5, 340 P.3d 396, 399 (App. 2014).

¶6 Generally, "[w]e review de novo whether jury instructions 'properly state the law.'" *State v. Cota*, 229 Ariz. 136,

[2]The grand jury also indicted Anderson for contributing to the delinquency of a minor, but the trial court later dismissed that count.

¶ 77, 272 P.3d 1027, 1042 (2012), *quoting State v. Glassel*, 211 Ariz. 33, ¶ 74, 116 P.3d 1193, 1213 (2005). Section 13-3421(A), A.R.S., provides that "[a] person who as a lessee or occupant intentionally uses a building for the purpose of unlawfully selling, manufacturing or distributing any dangerous drug or narcotic drug is guilty of a class 6 felony."[3] The statutory definition for dangerous drugs includes methamphetamine but not marijuana. *See* A.R.S. § 13-3401(6)(c)(xxxviii). The definition for narcotic drugs likewise does not include marijuana. *See* § 13-3401(20). Although the definition for narcotic drugs does include "[c]annabis," § 13-3401(20)(w), marijuana and cannabis "are statutorily distinct under subsections (4) and [(19)] of § 13-3401," *State v. Medina*, 172 Ariz. 287, 289, 836 P.2d 997, 999 (App. 1992). Cannabis refers to "[t]he resin extracted from any part of a plant of the genus cannabis, and every compound, manufacture, salt, derivative, mixture or preparation of such plant, its seeds or its resin." § 13-3401(4). Marijuana, in contrast, means "all parts of any plant of the genus cannabis, from which the resin has not been extracted, whether growing or not, and the seeds of such plant." § 13-3401(19). In other words, "marijuana is the plant and cannabis is certain things derived from the plant." *Medina*, 172 Ariz. at 289, 836 P.2d at 999.

¶7 Accordingly, although the trial court properly instructed the jury that methamphetamine is a dangerous drug, it erred when it concluded that cannabis and marijuana are synonymous and that marijuana is therefore "considered a narcotic." Moreover, the state did not present any evidence at trial that Anderson possessed cannabis. The officers testified that they found "green vegetation" or "marijuana." Thus, the court's instruction incorrectly suggested to the jury that they could find Anderson guilty under § 13-3421(A) based on evidence of either methamphetamine or marijuana. Instructing the jury on this non-existent theory of liability was fundamental error. *See State v. Dickinson*, 233 Ariz. 527, ¶ 12, 314 P.3d 1282, 1285 (App. 2013).

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[3] Although § 13-3421(A) lists "distributing" along with "selling" and "manufacturing," in this case, the language of the jury verdict omitted distribution.

¶8 The state argues, however, that Anderson invited the error by agreeing to the trial court's proposed instruction. We disagree. The doctrine of "invited error precludes a party who causes or initiates an error from profiting from the error on appeal." *State v. Lucero*, 223 Ariz. 129, ¶ 17, 220 P.3d 249, 255 (App. 2009). It applies when the defendant was "the source of the error" or "the party urging the error." *Id.*, *quoting State v. Logan*, 200 Ariz. 564, ¶ 11, 30 P.3d 631, 633 (2001). In this case, the jury raised the issue, and the court crafted the erroneous instruction. Although Anderson agreed to the court's proposed instruction, merely acquiescing to an instruction is not equivalent to inviting the error. *See id.* ¶ 24 (distinguishing "agreement with error" from "actively arguing for the error"); *see also State v. Pandeli*, 215 Ariz. 514, ¶¶ 48-50, 161 P.3d 557, 571 (2007).

¶9 Nonetheless, we must still determine whether the error resulted in prejudice. *See State v. Felix*, 237 Ariz. 280, ¶ 15, 349 P.3d 1117, 1122 (App. 2015). "To prove prejudice, [a defendant] must show that a reasonable, properly instructed jury could have reached a different result." *Ruiz*, 236 Ariz. 317, ¶ 13, 340 P.3d at 401, *quoting Dickinson*, 233 Ariz. 527, ¶ 13, 314 P.3d at 1286. Because Anderson also possessed methamphetamine, we must determine whether the jury could fail to convict Anderson for use of a building for the sale or manufacture of methamphetamine. To resolve the issue, we consider "the parties' theories, the evidence received at trial and the parties' arguments to the jury."[4] *Id.*, *quoting Dickinson*, 233 Ariz. 527, ¶ 13, 314 P.3d at 1286.

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[4]The state did not indicate which "building"—the storage unit or Anderson's home—or which "drug"—marijuana or methamphetamine—were the subject of the § 13-3421(A) charge, and the failure to do so created the risk of a non-unanimous verdict. *See State v. Paredes-Solano*, 223 Ariz. 284, ¶ 4, 222 P.3d 900, 903 (App. 2009) ("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.'"), *quoting State v. Klokic*, 219 Ariz. 241, ¶ 12, 196 P.3d 844, 847 (App. 2008); *see also State v. Waller*, 235 Ariz. 479, ¶ 33, 333 P.3d 806, 816 (App. 2014) ("The failure to . . .

¶10 At trial, the state presented evidence that Anderson possessed the methamphetamine for sale. One officer testified that a pound of methamphetamine is "considered a sales amount" and is equivalent to 1,800 doses worth $6,000. He also noted that the six baggies of methamphetamine found in Anderson's home, each with a label denoting its weight, were also consistent with sales. And he stated it was not uncommon for people to sell both marijuana and methamphetamine at the same time. Officers also found other items generally consistent with the sale of drugs, including a security camera, an electronic scale, and a ledger for tracking sales.

¶11 Anderson's primary defense at trial was that the methamphetamine belonged to someone else. He told officers that two other people used the storage unit: Anderson's uncle, who leased the space, and Anderson's friend, J.J., who "also kept his stuff there." In addition, officers "contacted another person inside [Anderson's] residence" during their search, but no other information regarding this person was introduced at trial. Based on this evidence, defense counsel argued that the uncle, J.J., or the other person found in Anderson's home could have owned the methamphetamine. She pointed out that officers had failed to follow-up with the others, review security footage from the storage unit facility, or take fingerprints from the locked safe inside the unit to see if Anderson had actually used it.

¶12 In addition, during her closing argument, defense counsel distinguished the allegations regarding the sale of marijuana from the sale of methamphetamine. She acknowledged that Anderson had confessed to selling marijuana out of the storage unit. She also noted that Anderson was, according to one officer, "super

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eliminate the risk of a non-unanimous verdict constitutes error."). However, because Anderson did not raise this issue below or on appeal, and because our disposition of the jury instruction error renders the duplicity issue moot, we do not address it further. *See State v. West*, 238 Ariz. 482, ¶ 49, 362 P.3d 1049, 1063 (App. 2015) (appellate court will not address waived issues absent fundamental error). In our analysis, we consider the evidence and argument concerning both the storage unit and Anderson's home.

cooperative" during the investigation. She therefore reasoned: If Anderson was also selling methamphetamine out of the storage unit, "[w]hy not admit to the whole thing, as long as he's doing the admitting?" Regarding Anderson's home, she noted that "lots of people have security cameras who don't engage in selling" and that it was impossible to tell whether the ledger tracked methamphetamine sales in addition to marijuana sales.

¶13 In response, the prosecutor argued it was unreasonable to presume someone else owned the methamphetamine in the storage unit but had given Anderson unfettered access to it, particularly given the value of and potential criminal liability associated with the methamphetamine. The prosecutor also noted, "[T]here are multiple ways to possess things and multiple people can possess something at the same time." *See* A.R.S. § 13-105(35) ("'Possession' means a voluntary act if the defendant knowingly exercised dominion or control over property.").

¶14 Although the state presented evidence that supported the prosecutor's arguments, it is nevertheless possible that a reasonable jury, properly instructed, could have found Anderson not guilty of using a building to sell, manufacture, or distribute methamphetamine, a dangerous drug, under § 13-3421(A). *See Felix*, 237 Ariz. 280, ¶ 22, 349 P.3d at 1124. "The jury is tasked with deciding the facts of the case" and "'may accept everything a witness says, or part of it, or none of it.'" *Ruiz*, 236 Ariz. 317, ¶ 16, 340 P.3d at 402, *quoting Smethers v. Campion*, 210 Ariz. 167, ¶ 19, 108 P.3d 946, 951 (App. 2005). A reasonable jury could have found Anderson had no connection to the methamphetamine given his level of cooperation with the officers and the fact that he readily admitted owning the marijuana but not the methamphetamine. Or the jury could find that, although Anderson exercised control over the storage unit, the home, and the methamphetamine found at both locations, reasonable doubt remained as to whether Anderson or the others were using either location for the purpose of selling, manufacturing, or distributing methamphetamine. *See* §§ 13-105(35), 13-3421(A). Notably, the jury convicted Anderson for possession of methamphetamine, but not for sale, under A.R.S. § 13-3407(A). And because the trial court erroneously instructed the

jury that marijuana is a narcotic drug, the jury could have relied solely on the evidence of marijuana to support a conviction under § 13-3421(A). *See State v. Juarez-Orci*, 236 Ariz. 520, ¶ 22, 342 P.3d 856, 862 (App. 2015) (finding prejudice where instruction error "related directly to [theory of] defense").

¶15 As we have noted, § 13-3421(A) also prohibits the use of a building for "manufacturing or distributing any dangerous drug." And the statutory definition of manufacture "includes any packaging or repackaging or labeling or relabeling of containers." § 13-3401(17). In this case, the methamphetamine found in Anderson's home was packaged and labeled. We acknowledge that the jury asked during its deliberations whether manufacturing included packaging methamphetamine. However, the state never urged the jury to find Anderson guilty under § 13-3421(A) under a theory of manufacturing or distributing. *See Ruiz*, 236 Ariz. 317, ¶ 13, 340 P.3d at 401. And as explained above, because a jury reasonably could find that Anderson had no connection to the methamphetamine, it also could have concluded that Anderson did not package the methamphetamine or, more generally, used either building to manufacture or distribute the drug.

¶16 Simply put, how the jury arrived at its verdict in this case, or whether a properly instructed jury would have necessarily come to that same result, is "unknowable" under these circumstances. *State v. James*, 231 Ariz. 490, ¶ 18, 297 P.3d 182, 186 (App. 2013). Indeed, the state does not offer any opposing argument regarding prejudice on appeal. Consequently, although we recognize there is substantial evidence supporting the conclusion that Anderson used the storage unit or his home for the purpose of selling, manufacturing, or distributing methamphetamine, we cannot conclude that a reasonable jury could not have reached a different result on this evidence had it been instructed correctly. *See Ruiz*, 236 Ariz. 317, ¶¶ 5, 13, 340 P.3d at 399, 401.

Disposition

¶17 For the foregoing reasons, we vacate Anderson's conviction and sentence for use of a building for the sale or

manufacture of a dangerous or narcotic drug, but we affirm his remaining convictions and sentences.