

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ROGELIO PORTILLO,
Appellant.

No. 2 CA-CR 2019-0280
Filed August 14, 2020

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NOT FOR PUBLICATION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. 31.19(e).

Appeal from the Superior Court in Greenlee County
No. CR201900033
The Honorable Monica L. Stauffer, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Michael T. O'Toole, Chief Counsel
By Diane Leigh Hunt, Assistant Attorney General, Tucson
Counsel for Appellee

E.M. Hale Law PLLC, Lakeside
By Elizabeth M. Hale
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Staring authored the decision of the Court, in which Chief Judge Vásquez and Judge Eppich concurred.

S T A R I N G, Presiding Judge:

¶1 Rogelio Portillo appeals from his convictions and sentences for possession of a dangerous drug for sale and possession of a dangerous drug. We affirm.

Factual and Procedural Background

¶2 In April 2019, Portillo was a passenger—seated directly behind the driver—in a car stopped by law enforcement. During the stop, the sheriff’s deputy observed drug paraphernalia in the seat pocket directly in front of Portillo. A vehicle search revealed: a bag full of cash, a bag of methamphetamine near the driver’s seat, marijuana paraphernalia and heroin in the driver’s-side door, a marijuana pipe under the driver’s seat, a bag of marijuana on the floor by the front passenger seat, several scales in the trunk, a methamphetamine pipe in the seat pocket in front of where Portillo had been sitting, three methamphetamine pipes in the passenger-seat pocket, multiple phones, and a duffle bag that contained, among other items, two bundles of methamphetamine.

¶3 After a jury trial, Portillo was convicted of several drug-related offenses, including one count of possession of a dangerous drug for sale and one count of possession of a dangerous drug.¹ He was sentenced to concurrent prison terms, the longest of which is ten years. This appeal followed. We have jurisdiction pursuant to article VI, § 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

¹Portillo was also convicted of conspiracy to commit transportation of a dangerous drug for sale, possession of marijuana, possession of a narcotic drug, misconduct involving weapons, and possession of drug paraphernalia. Those convictions, however, are not the subject of this appeal.

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Discussion

¶4 Portillo argues his convictions for possession of a dangerous drug for sale and possession of a dangerous drug violate the constitutional prohibitions against double jeopardy. Because Portillo did not raise the issue at trial, we review for fundamental error. *See State v. Price*, 218 Ariz. 311, ¶ 4 (App. 2008) (unobjected-to double-jeopardy violations reviewed for fundamental error); *see also State v. Escalante*, 245 Ariz. 135, ¶ 21 (2018).² “[A] violation of double jeopardy is fundamental error.” *Price*, 218 Ariz. 311, ¶ 4.

¶5 “A defendant’s right not to be subjected to double jeopardy is violated if he is convicted of both a greater and lesser-included offense.” *State v. Becerra*, 231 Ariz. 200, ¶ 20 (App. 2013); *Price*, 218 Ariz. 311, ¶ 5 (“For double jeopardy purposes, a lesser included offense and the greater offense of which it is a part constitute the same offense, and multiple punishments for the same offense are not permissible.”). “To constitute a lesser-included offense, the crime must be ‘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. Cope*, 241 Ariz. 323, ¶ 5 (App. 2016) (alteration in original) (quoting *State v. Garcia*, 235 Ariz. 627, ¶ 6 (App. 2014)). That is, “the greater offense must require each element of the lesser offense plus one or more additional elements not required by the lesser offense.” *Garcia*, 235 Ariz. 627, ¶ 6.

¶6 Section 13-3407(A)(1), A.R.S., provides that a “person shall not knowingly . . . [p]ossess or use a dangerous drug,” while § 13-3407(A)(2) provides that a person shall not knowingly “[p]ossess a dangerous drug for sale.” Because possession of a dangerous drug for sale requires the same two elements as possession of a dangerous drug, plus the additional element of the possession being for the purposes of sale, simple possession of a dangerous drug is a lesser-included offense of possession of a

²A defendant who fails to object at trial forfeits the right to appellate relief unless he can show trial error exists, and that the error went to the foundation of the case, took from him a right essential to his defense, or was so egregious that he could not possibly have received a fair trial. *Escalante*, 245 Ariz. 135, ¶¶ 12, 21. If a defendant can show an error went to the foundation of the case or deprived him of a right essential to his defense, he must also separately show prejudice resulted from the error. *Id.* If a defendant shows the error was so egregious he could not have received a fair trial, however, he has necessarily shown prejudice and must receive a new trial. *Id.*

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dangerous drug for sale. *See Cope*, 241 Ariz. 323, ¶ 5; *see also Garcia*, 235 Ariz. 627, ¶ 6.

¶7 On appeal, Portillo asserts that because both convictions arose from the same corpus of drugs and he “could not have committed the crime of possession for sale without also committing the crime of simple possession, convictions for both counts violate double jeopardy and the lesser-included charge must be vacated.” The state counters there was no double-jeopardy violation because “the simple-possession charge was based on the baggie of methamphetamine found on the floorboard near Portillo,” while the possession-for-sale charge was “based on the kilogram of methamphetamine found in the duffle bag.”

¶8 In his reply brief, Portillo contends this is not so because although there were various amounts of methamphetamine found in the car, at trial, the state argued for both charges based on the methamphetamine that was found in the duffle bag. Portillo also notes that during closing arguments, the state argued the methamphetamine in the duffle bag was closest to Portillo, saying “this large quantity of methamphetamine was evidence that he possessed that methamphetamine,” and in reference to the possession-for-sale charge, “discussed that the drugs were bundled and sealed in the duffle bag because they were for sale.” Lastly, Portillo points out that during discussions with the trial court, the state said that the simple-possession charge was related to another simple-possession charge involving a narcotic drug.

¶9 During its opening statement, the state referred to “a little baggie of a white, powdery substance between the driver’s seat and the front door, the driver’s door.” At trial, the state presented testimony from the deputy who had found the small baggie of methamphetamine on the floorboard, between the driver’s seat and the driver’s-side door. During argument on Portillo’s motion for acquittal pursuant to Rule 20, Ariz. R. Crim. P., the state argued: “The methamphetamine also was found in close proximity to the defendant, the meth pipe right in front. The location of those items together . . . is evidence that can show the defendant possessed those items and that they were intended to be used for ingesting those drugs”

¶10 During its closing argument, the state again referred to “a little baggie of methamphetamine right at the driver’s left side,” and, after describing a variety of other evidence pertaining to other charges, referred to “[t]wo bundles of methamphetamine found in a gray duffle bag.” The

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state again referred to methamphetamine in its discussion of possession: “Dangerous drug, methamphetamine. We have a bag of methamphetamine again here to the left of the driver. Two bundles of methamphetamine here, in this gray duffle bag. In speaking about possession of the methamphetamine in the duffle bag, the defendant is the only one with access to that.”

¶11 In reference to its evidence for the possession-for-sale charge, the state said:

Evidence of for sale, when you look at the quantity of the drugs. On its face, as was testified to, there’s more than the statutory threshold of 9 grams. This was, as the DPS officer from the crime lab suggested, probably closer to a thousand grams of methamphetamine. Her calculations were based on gross weight. And the report has the two figures, but added together they’re over a thousand grams. The fact that [they] were bundled the way that they were and sealed in the duffle bag, these were bundles to be for sale. . . . The scales in the trunk [were] evidence that these drugs were being transported and possessed for sale.

The state also referred to the large quantities of cash and multiple cell phones found in the car.

¶12 The state’s multiple references to the baggie of methamphetamine that was found to the left of the driver on the floor, near the methamphetamine pipe directly in front of Portillo, make clear that the simple-possession charge was based on that baggie of methamphetamine – not the two bundles in the duffle bag, which were the basis of the possession-for-sale charge. Because the charges were based on different corpora of drugs, the simple-possession charge was not a lesser-included offense of possession for sale. Thus, no double-jeopardy violation occurred, and we find no error, fundamental or otherwise. *See Becerra*, 231 Ariz. 200, ¶ 20; *see also Price*, 218 Ariz. 311, ¶ 4.

Disposition

¶13 For the foregoing reasons, we affirm Portillo’s convictions and sentences.