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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. FERNANDO SOTELO ENCINAS, Appellant.	)	2 CA-CR 2008-0285 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20070535

Honorable Howard Hantman, Judge

AFFIRMED IN PART; VACATED IN PART

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B R A M M E R, Judge.

¶1 Appellant, Fernando Encinas, appeals his convictions and sentences for possession of marijuana and possession of drug paraphernalia. Encinas contends the indictment was duplicitous and the trial court violated his due process rights by designating his offenses as felonies without notifying him of its intention to do so or holding a hearing. We affirm Encinas's convictions but vacate the trial court's order designating the offenses as felonies.

Factual and Procedural Background

¶2 We view the facts and all reasonable inferences therefrom in the light most favorable to sustaining Encinas's convictions and sentences. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). On January 23, 2007, Encinas smoked marijuana while sitting in the passenger's seat of a pickup truck driven by his cousin, O. O. drove to a dumpster, into which Encinas, after he got out of O.'s truck, threw a large bag containing marijuana in smaller, plastic bags. Tucson police officer Dennison saw Encinas run from the dumpster back to the truck and, finding Encinas's behavior suspicious, followed the truck. Dennison eventually stopped the truck for a traffic violation. When he approached the truck's passenger compartment, Dennison smelled burnt and fresh marijuana and noticed a small amount of marijuana on the console between Encinas and O. Encinas admitted to Dennison that he and O. had been smoking marijuana, that there was marijuana in the truck, and that he had thrown marijuana into the dumpster. A search of the truck revealed a small amount of loose marijuana, a partially smoked marijuana cigarette, and a scale wrapped in

a plastic grocery bag. In the dumpster, investigating officers found a bag containing a total of approximately 1.75 pounds of marijuana, divided among other, smaller, plastic bags.

¶3 A grand jury charged Encinas with possessing less than two pounds of marijuana for sale and possessing drug paraphernalia. After a three-day trial, a jury found him guilty of possession of drug paraphernalia and of the lesser-included offense of possession of less than two pounds of marijuana. At sentencing, the trial court suspended the imposition of sentence and placed Encinas on three years' probation. It then ordered Encinas's convictions to "remain undesignated until further order of the Court." Outside the presence of counsel and Encinas, and without having provided notice or having held a designation hearing, the court later "reviewed the file [and] determine[d] that the offenses are class six felonies." This appeal followed.

Discussion

Duplicitous indictment

¶4 Encinas contends count two of the indictment, which charged him with possession of "drug paraphernalia, to wit: baggies and/or a scale," was duplicitous. He argues the charge was duplicitous because it did not "specify[] which type of paraphernalia formed the factual basis for the . . . offense," making it "possible . . . there was no unanimity in the jury as to whether [he possessed] the scale or baggy."

¶5 As the state notes, Encinas conflates a duplicitous charge with a duplicitous indictment throughout his argument. 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). A "duplicitous indictment," in contrast, charges two or more offenses in a single count. *Id.* ¶ 10. Nonetheless, a duplicitous charge and a duplicitous indictment create the same hazards—both provide inadequate notice of the charge against which the defendant must defend, create the potential for a nonunanimous verdict, and hamper the precise pleading of prior jeopardy in any future prosecution. *See id.* ¶ 12. We interpret Encinas's argument as alleging his indictment was duplicitous and review that question de novo. *See State v. Ramsey*, 211 Ariz. 529, ¶ 5, 124 P.3d 756, 759 (App. 2005).

¶6 Encinas did not raise his objection to the indictment twenty or more days before trial as required.[1] *See* Ariz. R. Crim. P. 13.5(e), 16.1(b), (c); *State v. Anderson*, 210 Ariz. 327, ¶¶ 15-17, 111 P.3d 369, 377-78 (2005). Generally, when a defendant fails to object timely in the trial court, the alleged error is reviewed on appeal for fundamental, prejudicial error only. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005).[2] Under

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[1]When discussing the parties' proposed forms of verdict after the close of evidence, Encinas requested an interrogatory requiring the jury to specify whether it found he had possessed the scale, the plastic bags, both, or neither. He argued that, without such an interrogatory, the indictment "allow[ed] the jury to disagree about which item is the paraphernalia and find [him] guilty based on [a] split decision." Even were we to consider Encinas's request an objection to the indictment, it was nonetheless untimely. *See* Ariz. R. Crim. P. 13.5(e), 16.1(b), (c). Encinas does not argue on appeal that the trial court abused its discretion in declining to give his requested interrogatory.

[2]In *Anderson*, however, our supreme court suggested, without "expressly concluding," that "unpreserved claims of error concerning a defect in the charging document might not be subject to review of any kind." *State v. Urquidez*, 213 Ariz. 50, ¶ 4, 138 P.3d 1177, 1178 (App. 2006); *see also Anderson*, 210 Ariz. 327, ¶¶ 15-18, 111 P.3d at 377-78. Because we

fundamental error review, Encinas bears the burden to show not only that fundamental error occurred, but also that actual prejudice resulted. *See State v. Morales*, 215 Ariz. 59, ¶ 10, 157 P.3d 479, 481 (2007); *Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607; *see also State v. Petrak*, 198 Ariz. 260, ¶ 28, 8 P.3d 1174, 1182 (App. 2000) (noting that, if defendant suffers no prejudice from duplicitous indictment, conviction need not be reversed); *State v. Hamilton*, 177 Ariz. 403, 410, 868 P.2d 986, 993 (App. 1993) ("[T]o prevail on an arguably duplicitous indictment, defendant must demonstrate that he was actually prejudiced thereby."); *State v. Kelly*, 149 Ariz. 115, 117, 716 P.2d 1052, 1054 (App. 1986) (holding duplicitous indictment not prejudicial and no reversal required when overwhelming evidence supported conviction). Encinas, however, has neither asserted nor developed any argument regarding fundamental error or prejudice and thus has not sustained his burden on review. *See Morales*, 215 Ariz. 59, ¶ 10, 157 P.3d at 48; *Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607; *cf. State v. Moody*, 208 Ariz. 424, ¶ 165, 94 P.3d 1119, 1157 (2004) (appellant who failed to object at trial also failed to meet burden on appeal when he developed no argument that error was fundamental and prejudicial); *State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (forfeited argument waived on appeal if fundamental error not asserted).

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conclude that, even if the indictment were duplicitous, Encinas has failed to demonstrate either fundamental error or prejudice, we need not address the suggestion in *Anderson* and *Urquidez*.

Felony designations

¶7 Encinas argues, and the state concedes, the trial court violated former A.R.S. § 13-702(G)[3] and Encinas's right to due process by designating his convictions as felonies without having first notified him or having held a hearing on the issue. Because Encinas's claim presents a question of law, we review it de novo. *See State v. Rosengren*, 199 Ariz. 112, ¶ 9, 14 P.3d 303, 307 (App. 2000).

¶8 Trial judges have discretion to designate certain class six, felony offenses, including Encinas's, as class one misdemeanors. *See* § 13-702(G); *see also* A.R.S. § 13-3405(A)(1), (B)(1); A.R.S. § 13-3415(A). Our courts have repeatedly held, however, that a trial court must afford a defendant notice and an opportunity to be heard before designating such offenses as either felonies or misdemeanors. *See, e.g., State v. Pinto*, 179 Ariz. 593, 597, 880 P.2d 1139, 1143 (App. 1994); *State v. Benson*, 176 Ariz. 281, 283, 860 P.2d 1334, 1336 (App. 1993); *State v. Smith*, 166 Ariz. 118, 120, 800 P.2d 984, 986 (App. 1990); *see also* 1993 Ariz. Sess. Laws, ch. 255, § 11 (renumbering § 13-702(H) as § 13-702(G)). A court's failure to do so violates § 13-702(G) and the due process clauses of both the federal and Arizona constitutions. *See Benson*, 176 Ariz. at 283, 860 P.2d at 1336. By designating Encinas's convictions as felonies without having afforded him notice and an

[3]After Encinas was sentenced, § 13-702(G) was renumbered to § 13-604(A). *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 16, 24. We refer to the version of the statute in effect when Encinas was sentenced. *See State v. Winton*, 153 Ariz. 302, 305-06, 736 P.2d 386, 389-90 (App. 1987).

opportunity to be heard, the trial court violated § 13-702(G) and Encinas's due process rights. *See Benson*, 176 Ariz. at 283, 860 P.2d at 1336.

¶9 Nonetheless, the state insists, contrary to Encinas's suggestion, that "[t]here is no need to remand the case for a designation hearing." Instead, the state asserts the proper remedy "is to vacate only that portion of the trial court's order that . . . designates the offense[s] [as felonies]." We agree. A trial court "is not required to designate a defendant's offense[s] at a specific time." *State v. Soriano*, 217 Ariz. 476, ¶ 13, 176 P.3d 44, 48 (App. 2008); *see also State v. Winton*, 153 Ariz. 302, 305, 736 P.2d 386, 389 (App. 1987) (no right to have offense designated at time of sentencing). Rather, a trial court may "refrain from designating the offense[s] . . . until [after] the probation is terminated," § 13-702(G), as long as it does so "within a reasonable time after a motion to designate is filed." *Soriano*, 217 Ariz. 476, ¶ 16, 176 P.3d at 49. Encinas's probation has not expired and no motion to designate has been filed. Thus, there is no need to remand the case to the trial court for a designation hearing. *See id.*

Disposition

¶10 For the foregoing reasons, we affirm Encinas's convictions. We vacate the trial court's order designating the convictions as felonies but affirm Encinas's sentences in all other respects.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge-