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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STATE OF ARIZONA, Appellee, v. ANTONIO JUNIOR MARRUFO, Appellant.	2 CA-CR 2010-0024 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20091445001

Honorable Ted B. Borek, Judge

AFFIRMED

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E S P I N O S A, Judge.

¶1 Following a jury trial, Antonio Marrufo was convicted of attempt to sell a narcotic drug, cocaine base. After finding he had two historical prior felony convictions,

the trial court sentenced him to an enhanced but mitigated prison term of 7.5 years. On appeal, Marrufo argues the court erred by denying his motion for judgment of acquittal and refusing to instruct the jury about the offense of facilitation. For the following reasons, we affirm.

Factual Background and Procedural History

¶2 "On appeal, we view the facts in the light most favorable to upholding the verdict and resolve all inferences against the defendant." *State v. Klokic*, 219 Ariz. 241, n.1, 196 P.3d 844, 845 n.1 (App. 2008). One evening in April 2009, a Tucson police officer working in an undercover capacity went to a local park, met Marrufo and asked him if he "could hook [the officer] up." Marrufo asked whether he was a policeman, which the officer denied, and then asked what he was looking for. The officer said he wanted a "twenty," meaning twenty dollars' worth of crack cocaine. Marrufo then rode in the officer's car and directed him to a different park. While in the car, the officer told Marrufo that if the "twenty" was large, he might want to buy a "forty," meaning forty dollars' worth of cocaine.

¶3 Once they arrived at the second park, Marrufo briefly left the officer's car, saying he did not need the money yet, and returned with Jose Lopez. Although both men then attempted to get into the officer's car, he stopped them and said only one could get in. After Marrufo said Lopez knew where to go, Lopez got into the car and directed the officer to a Tucson residence, leaving Marrufo at the park. At the residence, the officer eventually purchased forty dollars' worth of crack cocaine after Lopez took the officer's

money and obtained the cocaine from inside the residence. Marrufo was arrested at the second park and subsequently was charged with two counts of sale of a narcotic drug.

¶4 At trial, following the close of evidence, the trial court denied Marrufo's motion for judgment of acquittal and his request for a jury instruction on facilitation as a lesser-included offense. The court instructed the jury on accomplice liability and the state argued Marrufo's guilt based on that theory. The jury acquitted Marrufo on both counts of sale of a narcotic drug but convicted him of the lesser-included offense of attempt to sell a narcotic drug. We have jurisdiction over this appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

Sufficiency of the Evidence

¶5 Marrufo argues the trial court erred in denying his motion for judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., contending there was insufficient evidence to sustain his conviction. We review the trial court's denial of a Rule 20 motion for an abuse of discretion. *State v. McCurdy*, 216 Ariz. 567, ¶ 14, 169 P.3d 931, 937 (App. 2007). "A judgment of acquittal is appropriate only when there is no substantial evidence to prove each element of the offense and support the conviction." *Id.* "Substantial evidence is evidence that 'reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt.'" *State v. Cox*, 217 Ariz. 353, ¶ 22, 174 P.3d 265, 269 (2007), *quoting State v. Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d 912, 914-15 (2005). "'[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential

elements of the crime beyond a reasonable doubt.'" *Id., quoting Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

¶6 To convict Marrufo of attempt to sell narcotics, the state was required to prove he had taken "any step in a course of conduct planned to culminate" in the sale of narcotics. A.R.S. §§ 13-1001(A)(2), 13-3408. The evidence demonstrated that Marrufo had asked the officer what drugs he wanted to purchase and rode with him in order to connect him with Lopez, who then took him to purchase crack cocaine. The jury was instructed that an accomplice is criminally liable for the conduct of the person who commits the substantive offense. *See* A.R.S. §§ 13-301, 13-303. We agree that based on the record before us, there was substantial evidence to prove each element of the offense and support the conviction. *See, e.g., State v. Saez*, 173 Ariz. 624, 628, 845 P.2d 1119, 1123 (App. 1992) (sufficient evidence supported conviction of attempt to sell narcotic drug because defendant's actions, including making telephone calls to locate cocaine for sale and meeting undercover officer for meeting to discuss sale, "could rationally be viewed by the jury as steps planned to culminate in commission of the sales offenses"); *cf. State v. Scott*, 177 Ariz. 131, 139, 865 P.2d 792, 800 (1993) (affirming denial of Rule 20 motion because substantial evidence supported conviction based on accomplice liability, "which makes no distinction between principals and accomplices").

¶7 Citing A.R.S. §§ 13-201 and 13-203(A), Marrufo argues his Rule 20 motion should have been granted because "there was no causal relationship between [his] conduct and the resulting sale." He maintains "the attempt statute does not relieve the State of its burden to prove a causal connection between [his] conduct and the eventual

purchase of crack, because [his] conduct could not possibly lead to a criminal offense unless he knew where to buy the drugs." Marrufo asserts "[a] more logical reading of the accomplice liability statute, A.R.S. § 13-301, provides that an accomplice must directly aid a principal actor—and that did not occur in this case."

¶8 Accomplice liability, however, is not as narrow as Marrufo claims and does not require the "direct[] aid" of a "principal actor" or actual knowledge of where the drugs were located. Instead, criminal liability may arise from acting as an "accomplice" in the commission of an offense, § 13-303(A)(3), which is defined as a person "with the intent to promote or facilitate the commission of an offense" who "[s]olicits . . . another person to commit the offense"; "[a]ids, counsels, agrees to aid or attempts to aid another person in planning or committing an offense"; or "[p]rovides means or opportunity to another person to commit the offense." § 13-301. Moreover, we reject Marrufo's faulty premise that Lopez was not a "principal actor." The record contains ample evidence to support Marrufo's conviction as an accomplice under one or more of the above definitions. Accordingly, because substantial evidence exists to support Marrufo's conviction, we cannot conclude the trial court abused its discretion in denying his Rule 20 motion.

Facilitation Jury Instruction

¶9 Marrufo next argues the trial court erred in refusing to instruct the jury on facilitation as a lesser-included offense. "We evaluate the trial court's denial of a proposed jury instruction for abuse of discretion, but review de novo whether a jury instruction correctly states the law." *Cox*, 217 Ariz. 353, ¶ 15, 174 P.3d at 268.

¶10 "Generally, there are two tests, the 'elements' test and the 'charging documents' test, to determine whether one offense is a lesser-included offense of a greater offense." *State v. Larson*, 222 Ariz. 341, ¶ 7, 214 P.3d 429, 431 (App. 2009).

> Under the "elements" test, a lesser-included offense is one "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." Thus, for one offense to be a lesser-included of another, the greater offense must have all the elements of the lesser offense plus at least one additional element. Moreover, "[i]t must also be shown that the lesser cannot be committed without always satisfying the corresponding elements of the greater."

Id. ¶ 8 (citations omitted). "Under the 'charging documents' test, an offense is a lesser-included offense if 'the charging document describes the lesser offense even though the lesser offense would not always form a constituent part of the greater offense.'" *Id.* ¶ 13, *quoting In re Jerry C.*, 214 Ariz. 270, ¶ 11, 151 P.3d 553, 556-57 (App. 2007). Marrufo contends he was entitled to a facilitation instruction under both the elements test and charging documents test.

Elements Test

¶11 Under the elements test, Marrufo argues facilitation is a lesser-included offense whenever the state relies on a theory of accomplice liability. He contends that "[o]nce the State invoked accomplice liability theory, . . . [it] was obligated to prove additional elements" beyond the substantive offense, including that Marrufo solicited another to commit the offense, aided or attempted to aid another in planning or committing an offense, or provided means or opportunity to another to commit the

offense. He therefore concludes the offenses of attempt, solicitation, and facilitation are lesser-included offenses "inherent in any charged offense under accomplice liability theory." Acknowledging *State v. Gooch*, 139 Ariz. 365, 678 P.2d 946 (1984), *State v. Garcia*, 176 Ariz. 231, 860 P.2d 498 (App. 1993), and *State v. Politte*, 136 Ariz. 117, 664 P.2d 661 (App. 1982), Marrufo concedes that both our supreme court and this court previously have rejected similar arguments, but contends these decisions ignore the language of the accomplice and facilitation statutes and "neglect[] the fact that the State's theory of prosecution is as much a determining factor of the elements of the offense as is the charged offense itself."

¶12 Even were we inclined to accept Marrufo's invitation to revisit some of our earlier decisions, our supreme court already has declined similar theories. *See Scott*, 177 Ariz. at 140, 865 P.2d at 801 (rejecting argument facilitation lesser-included offense of first-degree murder based on accomplice liability because "[c]learly it is possible to commit first[-]degree murder without committing the offense of facilitation"); *Gooch*, 139 Ariz. at 367, 678 P.2d at 948 (rejecting argument facilitation lesser-included offense of second-degree murder based on accomplice liability because "second-degree murder by statute and as charged could indeed have been committed without thereby committing facilitation"). Instead, the court has held that "the facilitation statute . . . 'gives the prosecuting attorney the option to charge a person as an aider and abettor under that statute rather than as a principal in the substantive offense.'" *Gooch*, 139 Ariz. at 367, 678 P.2d at 948, *quoting State v. Harris*, 134 Ariz. 287, 288, 655 P.2d 1339, 1340 (App. 1982). It is clearly possible to commit sale of a narcotic drug without committing the

offense of facilitation, and we are bound by our supreme court's decisions. *See State v. Lucero*, 223 Ariz. 129, ¶ 24, 220 P.3d 249, 257 (App. 2009). We therefore reject Marrufo's argument under the elements test.

Charging Documents Test

¶13 As set forth above, under the charging documents test "an offense is a lesser-included offense if 'the charging document describes the lesser offense even though the lesser offense would not always form a constituent part of the greater offense.'" *Larson*, 222 Ariz. 341, ¶ 13, 214 P.3d at 432, *quoting Jerry C.*, 214 Ariz. 270, ¶ 11, 151 P.3d at 556-57. Marrufo does not explain how the charging document in this case, the indictment, describes the offense of facilitation, merely asserting that under this test, "it was impossible for [him] to commit sale of a narcotic drug under the theory of accomplice liability without also committing facilitation to commit sale of a narcotic drug."

¶14 Marrufo's argument ignores that the indictment fails to include any information relating to the offense of facilitation. As our supreme court has explained in addressing a similar argument in an accomplice liability case, because "[t]he facts contained in the indictment d[id] not *describe* the lesser crime of facilitation," "we need not, and do not, decide whether another result might be reached under some other indictment." *Scott*, 177 Ariz. at 140-41, 865 P.2d at 801-02. And, to the extent Marrufo is claiming the evidence supported a facilitation instruction, this argument repeatedly has been rejected. *See State v. Laffoon*, 125 Ariz. 484, 487, 610 P.2d 1045, 1048 (1980) (lesser-included offenses not determined by "the facts of a given case"; "[o]ften facts

may support another lesser conviction but if not charged in the indictment, the lesser offense may not be found"); *State v. Robles*, 213 Ariz. 268, ¶ 9, 141 P.3d 748, 751 (App. 2006) (rejecting defendant's assertion that all facts contained in record should be considered in determining whether lesser-included-offense instruction required); *State v. Brown*, 195 Ariz. 206, ¶ 10, 986 P.2d 239, 242 (App. 1999) ("[I]t is the charging document and not the evidence that determines" whether a lesser-included offense instruction should have been given.); *cf. State v. West*, 176 Ariz. 432, 443-44, 862 P.2d 192, 203-04 (1993) (rejecting defendant's argument that jury should have been instructed on "lesser-related offenses," i.e., those offenses "supported by the facts of the case, although not included in the charging document"), *overruled in part on other grounds, State v. Rodriguez*, 192 Ariz. 58, n.7, 961 P.2d 1006, 1012 n.7 (1998). Accordingly, Marrufo's argument he was entitled to a facilitation instruction under the charging documents test fails as well.

Conclusion

¶15 Because there was substantial evidence to support Marrufo's conviction and because the trial court did not err in refusing to instruct the jury on facilitation, Marrufo's conviction and sentence are affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge