

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

FRANCISCO JAVIER ARIAS, *Appellant*.

No. 1 CA-CR 15-0687
FILED 10-25-2016

Appeal from the Superior Court in Yuma County
No. S1400CR201401321
The Honorable Maria Elena Cruz, Judge

AFFIRMED IN PART; VACATED IN PART; MODIFIED IN PART

COUNSEL

Arizona Attorney General's Office, Phoenix
By David Simpson
Counsel for Appellee

Yuma County Public Defender's Office, Yuma
By Edward F. McGee
Counsel for Appellant

STATE v. ARIAS
Decision of the Court

MEMORANDUM DECISION

Presiding Judge Peter B. Swann delivered the decision of the court, in which Judge Jon W. Thompson and Judge Donn Kessler joined.

S W A N N, Judge:

¶1 Francisco Javier Arias appeals his convictions and sentences for possession of dangerous drugs for sale, transportation of dangerous drugs for sale, tampering with physical evidence, possession of drug paraphernalia, driving while license revoked, and possession of spirituous liquor in a motor vehicle. We hold that the dual convictions for possession and transportation of dangerous drugs for sale violated Arias’s constitutional protection against double jeopardy, and we therefore vacate the conviction and sentence for the possession count. We further hold that the court imposed an illegal sentence for possession of spirituous liquor in a motor vehicle, and we modify the judgment accordingly. We otherwise affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Shortly before midnight on October 29, 2014, Corporal Carlos Buitrago and Officer Matthew Oxendine were on routine patrol duty when they observed a red Chevy Tahoe swerve across a double-yellow line. Buitrago activated the patrol car’s emergency lights, but the Tahoe did not stop. Buitrago then activated the patrol car’s siren, and the Tahoe slowly came to a full stop. After parking behind the Tahoe, the officers exited the patrol car, with Buitrago approaching on the driver’s side and Oxendine approaching on the passenger’s side.

¶3 The officers noted that the vehicle had four occupants, with Arias in the driver’s seat. When Buitrago asked Arias for his driver’s license, Arias explained that it had been revoked. Buitrago noticed “crystalline shards” on the floorboard, the driver’s seat, and Arias’s pants and shoes.

¶4 Meanwhile, from his vantage point on the passenger’s side of the vehicle, Oxendine observed an open beer container in a front-seat cup holder. At Buitrago’s prompting, Oxendine then looked to the floorboard on the driver’s side and saw a torn baggie and a crystalline substance. He also saw the substance on the driver’s seat. Based on his previous

STATE v. ARIAS
Decision of the Court

experience, Oxendine immediately suspected that the substance was methamphetamine.

¶5 Buitrago searched Arias's and the other occupants' persons but found no contraband. Oxendine searched the vehicle and found a torch-lighter. He then used a small tool to collect the crystalline shards from the vehicle.

¶6 Arias was arrested and charged with one count of possession of dangerous drugs for sale, one count of transportation of dangerous drugs for sale, one count of tampering with physical evidence, one count of possession of drug paraphernalia, one count of driving while license revoked, and one count of possession of spirituous liquor in a motor vehicle.

¶7 At trial, a police criminalist testified that the crystalline substance seized from the Tahoe was 12.4 grams of methamphetamine. Officer Andres Angulo then testified that two-tenths of a gram of methamphetamine had a local street value of twenty dollars and comprises two "uses" for the average user.

¶8 The jury convicted Arias as charged. The court found that Arias had a prior conviction and sentenced him to concurrent presumptive prison terms of ten years for possession of dangerous drugs for sale, ten years for transportation of dangerous drugs, one year for tampering with physical evidence, and one year for possession of drug paraphernalia, and concurrent maximum prison terms of six months for driving while license revoked and six months for possession of spirituous liquor in a motor vehicle.

¶9 Arias timely appeals.

DISCUSSION

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING ANGULO'S TESTIMONY.

¶10 Arias first contends that the superior court erred by permitting Angulo, the state's "cold" expert witness, to testify that he had previously served on a "narcotics task force." Specifically, Arias contends that Angulo's testimony "suggested" that he had "'other knowledge' that Arias was a drug dealer." We review the admission of expert testimony for abuse of discretion. *State v. Salazar-Mercado*, 234 Ariz. 590, 594, ¶ 13 (2014). We discern no abuse of discretion here.

STATE v. ARIAS
Decision of the Court

¶11 To lay foundation for Angulo’s expert testimony regarding local methamphetamine pricing, the prosecutor elicited testimony that Angulo had previously worked as a narcotics investigator for the county sheriff’s narcotics task force. Over Arias’s objection, Angulo explained that the mission of the task force was “to detect, apprehend, and disrupt drug trafficking organization,” and he identified the agencies involved with the task force and described the manner in which they shared information. Angulo also testified, over objection, that he had orchestrated drug buys and utilized informants while working as a narcotics investigator.

¶12 On cross-examination, Angulo testified that he had not reviewed any police reports related to Arias’s case and that his knowledge of the facts was limited to the prosecutor’s “basic brief[ing].” Angulo further stated that he did not know whether informants were involved in Arias’s case, and he reiterated that he had never spoken to any law enforcement officers about the matter.

¶13 Relevant evidence is admissible unless it is otherwise precluded by the federal or state constitution, or an applicable statute or rule. Ariz. R. Evid. (“Rule”) 402. Evidence is relevant if it has “any tendency” to make a fact of consequence in determining the action “more or less probable than it would be without the evidence.” Ariz. R. Evid. 401. Relevant evidence may be excluded, however, if its probative value “is substantially outweighed” by a danger of unfair prejudice. Ariz. R. Evid. 403. The court may admit testimony from a “cold” qualified expert that “educates the trier of fact about general principles but is not tied to the particular facts of the case” when such testimony satisfies Rule 702 and is not barred by Rule 403. *Salazar-Mercado*, 234 Ariz. at 595, ¶ 21.

¶14 Here, Angulo’s testimony regarding the local pricing of methamphetamine was relevant to an issue before the jury: whether Arias possessed or transported methamphetamine for sale or for personal use. Angulo’s testimony allowed the jury to reasonably infer that a person would not carry drugs for at least one hundred and twenty uses, worth at least twelve hundred dollars, for mere personal use. To elicit that testimony, the state was required under Rule 702(a) to establish that Angulo had the requisite experience and knowledge to qualify as an expert. Angulo’s testimony regarding his controlled drug buys and interviews with informants was relevant to establish that expertise and to establish his credibility. *See State v. McCall*, 139 Ariz. 147, 158 (1983) (“[A]ny evidence that substantiates the credibility of a prosecution witness on the question of guilt is material and relevant and may be properly admitted.”).

STATE v. ARIAS
Decision of the Court

¶15 Further, nothing in the record suggests that Angulo's testimony unduly harmed Arias or misled the jury under Rule 403. Angulo unequivocally stated that he had no involvement with the case, had not reviewed the police file or spoken to officers regarding the case, and had received only a "basic brief[ing]" from the prosecutor regarding the charges. The record does not substantiate Arias's claim that the jury may have been misled to believe that Angulo had some outside knowledge of Arias's drug activities through Angulo's previous work as a narcotics investigator.

¶16 Nonetheless, relying on *State v. Gamez*, 144 Ariz. 178 (1985), and *State v. Green*, 110 Ariz. 293 (1974), Arias argues that "Officer Angulo's repeated references to his experiences on the drug task force . . . was improper 'other act' testimony prohibited by Rule 404(b)." In *Gamez*, the supreme court held that an officer's testimony that he was surveilling the defendant as part of the "major offenders unit" was inadmissible. 144 Ariz. at 179-80. Specifically, the court reasoned that the assignment name, "major offenders unit," strongly implied that the defendant had been involved in other serious criminal activity. *Id.* at 179. Similarly, in *Green*, the supreme court held that an officer's testimony that the defendant was a "known . . . dealer in narcotics" was "most certainly prejudicial" and therefore inadmissible. 110 Ariz. at 294-95.

¶17 Unlike in *Gamez* and *Green*, Angulo neither suggested that he had knowledge of Arias's criminal activity through his work as a narcotics investigator nor intimated that Arias had committed any previous crimes. *See Gamez*, 144 Ariz. at 180 (recognizing "officers can testify about their assignments and duties if such testimony does not suggest that [the] defendant committed a crime"). Indeed, contrary to Arias's claim that Angulo improperly testified regarding Arias's prior bad acts, Angulo expressly disclaimed any knowledge of Arias or the case. We find no abuse of discretion in the superior court's evidentiary rulings.

II. ARIAS'S CONVICTIONS FOR BOTH POSSESSION AND TRANSPORTATION OF DANGEROUS DRUGS FOR SALE VIOLATED HIS CONSTITUTIONAL PROTECTION AGAINST DOUBLE JEOPARDY.

¶18 Arias next contends that his convictions for both possession and transportation of dangerous drugs for sale deprived him of his constitutional protection against double jeopardy because the possession offense is a lesser-included offense of the transportation offense. The state confesses error, and we agree.

STATE v. ARIAS
Decision of the Court

¶19 The double jeopardy clauses of the federal and state constitutions “protect criminal defendants from multiple convictions and punishments for the same offense.” *State v. Ortega*, 220 Ariz. 320, 323, ¶ 9 (App. 2008). When the same act violates “two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.” *Id.* at 324, ¶ 9 (citation omitted). A lesser-included offense, “composed solely of some but not all of the elements of the greater crime,” *State v. Cheramie*, 218 Ariz. 447, 448, ¶ 9 (2008) (citation omitted), and the greater offense are the “‘same offense’ for double jeopardy purposes,” *Ortega*, 229 Ariz. 324, ¶ 9. Whether an offense is a lesser-included offense of a greater offense is a question of law that we review de novo. *Cheramie*, 218 Ariz. at 448, ¶ 8.

¶20 The crime of transportation of dangerous drugs for sale requires the state to prove that the defendant knowingly transported a dangerous drug for sale. A.R.S. § 13-3407(A)(7). The crime of possession of dangerous drugs for sale requires the state to prove that the defendant knowingly possessed a dangerous drug for sale. A.R.S. § 13-3407(A)(2). Because a person cannot transport a drug without possessing it, the elements of possession of a dangerous drug for sale are all included within the elements of transportation of a dangerous drug for sale, making possession for sale a lesser-included offense. *Cheramie*, 218 Ariz. at 449, ¶¶ 10-12; *State v. Chabolla-Hinojosa*, 192 Ariz. 360, 363, ¶ 12 (App. 1998). Arias’s convictions for both the greater and lesser offenses therefore violate the constitutional protections against double jeopardy. Accordingly, we vacate the conviction and sentence for the possession count.

III. THE COURT IMPOSED AN ILLEGAL SENTENCE ON ARIAS’S CONVICTION FOR POSSESSION OF SPIRITUOUS LIQUOR IN A MOTOR VEHICLE.

¶21 Arias finally contends that the superior court erred by sentencing him to a prison term beyond the maximum permitted by law for possession of spirituous liquor in a motor vehicle. The state confesses error, and we agree.

¶22 Under A.R.S. § 4-251(B), a person who commits the crime of possession of spirituous liquor in a motor vehicle is guilty of a class 2 misdemeanor. The maximum sentence for a class 2 misdemeanor is a four-month prison term. A.R.S. § 13-707(A)(2). Here, the indictment erroneously designated the crime as a class 1 misdemeanor and the trial court erroneously treated the offense as such at sentencing by imposing a six-month prison term. *See* A.R.S. § 13-707(A)(1). An illegal sentence

STATE v. ARIAS
Decision of the Court

constitutes fundamental, prejudicial error. *State v. Thues*, 203 Ariz. 339, 369, ¶ 4 (App. 2002). We therefore modify the judgment to reflect that possession of spirituous liquor in a motor vehicle is a class 2 misdemeanor, and we reduce the sentence to a four-month prison term. *See* Ariz. R. Crim. P. 31.17(d) (authorizing court to modify a judgment); A.R.S. § 13-4037(A) (authorizing appellate court to correct an illegal sentence).

CONCLUSION

¶23 For the foregoing reasons, we vacate Arias's conviction and sentence for possession of dangerous drugs for sale, and we modify the judgment and reduce the sentence for his conviction for possession of spirituous liquor in a motor vehicle. We otherwise affirm.



AMY M. WOOD • Clerk of the Court
FILED: AA