

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
)	2 CA-CR 2007-0204
Appellee,)	DEPARTMENT A
)	
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
CAROLE ANN DIXON,)	Rule 111, Rules of
)	the Supreme Court
Appellant.)	
)	

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR 2005-01874

Honorable Joseph R. Georgini, Judge

AFFIRMED IN PART
VACATED IN PART

Terry Goddard, Arizona Attorney General
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PELANDER, Chief Judge.

¶1 After a jury trial, appellant Carole Ann Dixon was convicted of possession of a dangerous drug for sale, possession of a dangerous drug, and possession of drug paraphernalia. The trial court sentenced her to concurrent prison terms, the longest of which was five years, on the two drug possession convictions and imposed a consecutive term of probation on the paraphernalia conviction. On appeal, Dixon argues the trial court erred in denying her motion to suppress evidence and violated her due process rights by allowing a police officer to testify “as to the ultimate issue before the jury.” In its answering brief, the state volunteers that Dixon’s conviction and sentence for possession of a dangerous drug violate double jeopardy principles and, therefore, must be vacated. We agree with this latter contention but affirm the other two convictions and sentences.

Background

¶2 In October 2005, Casa Grande Police detective Ramon Salinas received information from a confidential informant (CI) indicating Dixon had left her residence and likely was concealing methamphetamine in her bra. After obtaining a warrant to search Dixon’s person and home, Salinas stopped her vehicle near her residence and served her with the warrant. A female officer searched Dixon’s bra and discovered two bags containing methamphetamine. Salinas found a glass pipe used for smoking methamphetamine and \$265 in small bills in Dixon’s purse. When Salinas and other officers searched Dixon’s home, they found a video surveillance camera pointed toward the back door, “numerous items of drug paraphernalia,” scales, twelve firearms, and “over a hundred rounds of ammunition.”

Discussion

I. Motion to suppress

¶3 Dixon first maintains the trial court erred in denying her motion to suppress the evidence police had seized from her person, purse, and home. On review of that ruling, “we consider only the evidence presented at the suppression hearing.” *State v. May*, 210 Ariz. 452, ¶ 4, 112 P.3d 39, 41 (App. 2005). We view that evidence “and reasonable inferences therefrom in the light most favorable to upholding the ruling.” *State v. Rodriguez*, 205 Ariz. 392, ¶ 34, 71 P.3d 919, 929 (App. 2003). “We will not reverse a trial court’s ruling on a motion to suppress absent an abuse of discretion,” *State v. Prince*, 160 Ariz. 268, 272, 772 P.2d 1121, 1125 (1989), or “clear and manifest error.” *State v. Riley*, 196 Ariz. 40, ¶ 10, 992 P.2d 1135, 1139 (App. 1999).

¶4 Dixon argues the trial court should have granted her motion to suppress because she established “that the search warrant affidavit contained inaccuracies or omissions which invalidated” it. She also contends the court “placed [her] in a catch-22 situation” by allowing Salinas to refuse to answer certain questions, thereby “preventing [her] from developing a complete record” on the sufficiency of the information supporting the search warrant.

¶5 “The Fourth Amendment to the United States Constitution requires that search warrants be issued only upon a showing of probable cause supported by oath.” *State v. Collins*, 21 Ariz. App. 575, 576, 522 P.2d 40, 41 (1974); *see also* A.R.S. §§ 13-3913, 13-3914(B), 13-3915(A). Probable cause exists if, “given all the circumstances set forth in the

affidavit before [the issuing magistrate], including the ‘veracity’ and ‘basis of knowledge’ of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.” *Illinois v. Gates*, 462 U.S. 213, 238 (1983). As the reviewing court, the trial court’s duty “is simply to ensure that the magistrate had a ‘substantial basis for . . . conclud[ing]’ that probable cause existed.” *Id.* at 238-39 (alteration in *Gates*), quoting *Jones v. United States*, 362 U.S. 257, 271 (1960), overruled on other grounds by *United States v. Salvucci*, 448 U.S. 83, 85 (1980); see also *State v. Buccini*, 167 Ariz. 550, 555, 810 P.2d 178, 183 (1991) (generally, magistrate’s finding of probable cause to issue search warrant will not be overturned unless clearly erroneous). Similarly, we give deference to the issuing magistrate’s determination of probable cause, see *State v. deBoucher*, 135 Ariz. 220, 227, 660 P.2d 471, 478 (App. 1982), and the defendant bears the burden of showing that the warrant was not supported by probable cause. See *State v. Hyde*, 186 Ariz. 252, 271, 921 P.2d 655, 674 (1996); *State v. Crowley*, 202 Ariz. 80, ¶ 7, 41 P.3d 618, 621 (App. 2002).

¶6 Dixon argues probable cause was lacking because, when obtaining the warrant, Salinas did not state in his affidavit to the magistrate that the CI had been paid, how much money he or she had received, or whether the CI had previously furnished information that resulted in any arrests or convictions. To establish probable cause,

“the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, was ‘credible’ or his information ‘reliable.’”

State v. James, 10 Ariz. App. 394, 396, 459 P.2d 121, 123 (1969) (citations omitted), quoting *Aguilar v. Texas*, 378 U.S. 108, 114 (1964), abrogated by *Gates*, 462 U.S. 213; see also *State v. Vail*, 158 Ariz. 334, 336, 762 P.2d 621, 623 (App. 1988).

¶7 In his affidavit, Salinas averred that the CI “ha[d] made several control[led] buys under [his] supervision” and “ha[d] also provided information regarding a number of people . . . involved in dealing narcotic or dangerous drugs.” Salinas further stated, “All of the information provided by this informant has been confirmed by my own personal knowledge or information provided by other officers.” That the CI was known to Salinas and had proven reliable in participating in controlled buys in the past was sufficient to support the issuing magistrate’s implicit finding of reliability. See *State v. Camargo*, 112 Ariz. 50, 51-52, 537 P.2d 920, 921-22 (1975); *James*, 10 Ariz. App. at 396, 459 P.2d at 123. Dixon cites no authority to support her contrary contention that the affidavit’s sufficiency or the warrant’s validity hinged on more details about payments made to the CI or a record of arrests or convictions resulting from information the CI previously had provided. See Ariz. R. Crim. P. 31.13(c)(1)(vi).

¶8 Dixon likewise provides no authority to support her argument that the trial court erred by not compelling Salinas to answer questions about whether the CI had used a vehicle when previously buying drugs from her, apparently in a controlled buy, and about where Salinas had met and searched the CI in connection with that buy. *Id.* Additionally, the record reflects that, although Salinas did not specifically testify about those points, he did testify about how the search of the CI’s person had been conducted and how a vehicle

would have been searched if one had been used in connection with the CI's prior controlled buy of drugs from Dixon. On the record before us, we conclude that testimony adequately provided the evidence Dixon claimed to be seeking in support of her argument below on the motion to suppress. We cannot say the trial court abused its broad discretion in its evidentiary rulings on these points. *See State v. Oliver*, 158 Ariz. 22, 30, 760 P.2d 1071, 1079 (1988). In sum, the trial court did not clearly and manifestly err in denying Dixon's motion to suppress. *See Riley*, 196 Ariz. 40, ¶ 10, 992 P.2d at 1139.

II. Opinion testimony

¶9 Dixon next argues the trial court violated her constitutional right to due process by allowing Salinas to testify “as to the ultimate issue before the jury.” Without objection, Salinas testified that, “as an expert,” he was “in a position to offer an opinion as to the activity . . . taking place” in Dixon's home. He stated that certain indicators, including “baggies,” “meth[amphetamine] in separate locations,” the presence of scales, a security camera and weapons, and the small bills found in Dixon's purse, suggested that she “was selling methamphetamine[] from her address.” Because Dixon did not object to that testimony below, we review only for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). “To obtain relief under the fundamental error standard of review, [Dixon] must first prove error.” *Id.* ¶ 23.

¶10 Salinas, a detective with the Casa Grande Police Department's Special Enforcement Unit, had been a police officer for over ten years. During the five years before the trial in this case, he had received local, state, and federal Drug Enforcement

Administration training on conducting narcotics investigations. He had also worked exclusively on drug crimes during the two years before trial and had extensive contact with drug users and sellers during that time. On this record, we cannot say the trial court erred in allowing Salinas to provide expert testimony on drug sales. *See State v. Keener*, 110 Ariz. 462, 466, 520 P.2d 510, 514 (1974).

¶11 Under Rule 704, Ariz. R. Evid., “[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.” And the law is clear that it is not an “abuse of discretion [to] permit[] [a] police officer to state his opinion and the basis for it” as an expert in drug cases. *Keener*, 110 Ariz. at 466, 520 P.2d at 514; *see also State v. Carreon*, 151 Ariz. 615, 617, 729 P.2d 969, 971 (App. 1986) (“A police officer’s expert testimony concerning whether drugs were possessed for sale has long been admissible in this state.”). *Fuenning v. Superior Court*, 139 Ariz. 590, 680 P.2d 121 (1983), on which Dixon relies, does not “affect[] that long-standing rule.” *Carreon*, 151 Ariz. at 617, 729 P.2d at 971. In sum, the trial court did not err, fundamentally or otherwise, in failing to exclude, sua sponte, Salinas’s testimony in this area.

III. Redundant conviction

¶12 Although Dixon did not raise the issue below or in her opening brief, the state asserts that her convictions for possession of methamphetamine and possession of methamphetamine for sale are “redundant” and, therefore, “must be vacated.” In her reply brief, Dixon concurs. The state cites *Fitzgerald v. Superior Court*, 173 Ariz. 539, 544, 845

P.2d 465, 470 (App. 1992), for the general, correct proposition that, “[i]f the offenses in two prosecutions have identical statutory elements, or if one is a lesser included offense of the other, the second prosecution is barred on double jeopardy grounds.” *See also Lemke v. Rayes*, 213 Ariz. 232, ¶¶ 16-18, 141 P.3d 407, 413-14 (App. 2006) (double jeopardy principles prohibit convictions and punishment for both greater offense and lesser-included offense). Because Dixon did not object below, we review only for fundamental error. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. A double jeopardy violation, however, constitutes fundamental, prejudicial error. *See State v. McGill*, 213 Ariz. 147, ¶ 21, 140 P.3d 930, 936 (2006); *see also State v. Siddle*, 202 Ariz. 512, n.2, 47 P.3d 1150, 1153 n.2 (App. 2002).

¶13 Without citing any authority, the state also asserts “possession of a dangerous drug . . . [i]s a lesser included offense of the possession for sale count.” As we have recently stated: “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.” *State v. Price*, ___ Ariz. ___, ¶ 5, 183 P.3d 1279, 1281 (App. 2008). Pointing to the indictment against Dixon and the facts adduced at trial, the state contends the two counts in question “were based on the same corpus: the methamphetamine found on [her] person.” But, “[t]o determine whether offenses are the same, we analyze the elements of the offenses, not the facts of the case.” *Id.*; *see also id.* ¶ 8 & n.1.

¶14 When comparing the elements of the offenses at issue here, Dixon could not have committed possession of a dangerous drug for sale without also committing possession of that same dangerous drug. See A.R.S. §§ 13-105(10), (30), 13-3407(A)(1), (2). As this court has stated, “[p]ossession of drugs for personal use is a lesser-included offense of possession of drugs for sale.”¹ *Gray v. Irwin*, 195 Ariz. 273, ¶ 12, 987 P.2d 759, 762 (App. 1999); cf. *State v. Chabolla-Hinojosa*, 192 Ariz. 360, ¶ 12, 965 P.2d 94, 97 (App. 1998) (“We hold that, when the charged possession for sale is incidental to the charged transportation for sale, it is a lesser-included offense, for a person cannot commit the transportation offense without necessarily committing the possession offense.”); *State v. Moroyoqui*, 125 Ariz. 562, 564, 611 P.2d 566, 568 (App. 1980).² Therefore, although the double jeopardy issue was not raised below, Dixon’s conviction and sentence for possession of a dangerous drug cannot stand.

¹In keeping with that proposition, the jury was instructed that “Possession of a Dangerous Drug for Sale includes the lesser offense of Possession of a Dangerous Drug” and that the jurors should “consider the lesser offense of Possession of a Dangerous Drug if either: . . . You find the defendant not guilty of Possession of a Dangerous Drug for Sale; or . . . you cannot agree on whether to find the defendant guilty.” The jury instead found Dixon guilty on both counts.

²Neither side addresses or even cites *State v. Cheramie*, 217 Ariz. 212, 171 P.3d 1253 (App. 2007). There, this court held that possession of a dangerous drug is not a lesser-included offense of transportation of a dangerous drug for sale because possession requires a showing that the defendant possessed a “usable quantity” of drugs while transportation for sale has no quantity element. *Id.* at ¶¶ 6-7. We note that our supreme court granted review and has held oral argument in *Cheramie*. Therefore, we do not dissect the court’s analysis or authorities cited in that case. But to the extent *Cheramie* might suggest that possession of a dangerous drug is not a lesser-included offense of possession of a dangerous drug for sale for double jeopardy purposes, we disagree.

Disposition

¶15 For the reasons stated above, Dixon's conviction and sentence for possession of a dangerous drug is vacated. But we affirm her conviction and sentence for possession of a dangerous drug for sale and her conviction and probationary term for possession of drug paraphernalia.

JOHN PELANDER, Chief Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

J. WILLIAM BRAMMER, JR., Judge