DIVISION ONE
FILED: 07/19/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 11-0484
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	
MICHAEL MENDOZA,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR 2009-154101

The Honorable Colleen L. French, Commissioner

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Angela Kebric, Assistant Attorney General
Attorneys for Appellee

Gail Gianasi Natale — Phoenix
Attorney for Appellant

H A L L, Judge

¶1 Defendant Michael Mendoza (defendant) appeals his convictions and sentences of one count of possession of drug

paraphernalia and one count of possession or use of narcotic drugs. For the following reasons, we affirm.

FACTUAL[1] AND PROCEDURAL BACKGROUND

¶2 On August 25, 2009, defendant was charged with one count of possession of drug paraphernalia, to-wit: a baggie, a class 6 felony, and one count of possession or use of narcotic drugs, a class 4 felony. The case was tried on December 8 and 9, 2009. Phoenix Police Detective G.D. testified that on August 14, 2009, he conducted surveillance on a suspected drug dealer's house and saw activity that he associated with drug trafficking, such as "cars and people coming and going from the house, only staying for a few moments." Detective G.D., and his partner Detective R.P., subsequently knocked on the front door of the house approximately one minute after a vehicle parked in the driveway, and a passenger, whom Detective G.D. testified was defendant, exited the vehicle and went into the house. Two people answered the door, one of whom appeared to be hiding a methamphetamine pipe and a lighter in his hands. Detectives G.D. and R.P. entered the house and detained the two people. Detective G.D. then noticed defendant standing directly behind the front door and in front of a bedroom door. After detaining defendant and several other people in the house, Detective G.D.

[1] We review the evidence and inferences drawn from the evidence in a light most favorable to upholding the verdict. *See State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

testified that Detective R.P. found a white plastic baggie of heroin encased in black tar in the exact area behind the door where defendant had been standing.[2] Detective G.D. further stated that based upon the size of the area behind the door and the location of the other detainees, it was not possible for the other detainees to place or throw the heroin behind the door.

¶3 After defendant was arrested and read his *Miranda*[3] rights, he agreed to answer questions from Detective G.D. Defendant stated that he went to the house to buy heroin and to introduce his friend—-the driver of the vehicle-—to the drug dealer. Defendant told Detective G.D. that he had intended to buy forty dollars worth of heroin; he had given one of the people that answered the door twenty dollars; and the person took the money and put it in the bedroom behind the front door.[4] Defendant further stated that he did not receive heroin in exchange for the money. Defendant had the remaining twenty dollars in his pocket at the time of his arrest.

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[2] Prior to trial, the State and defendant stipulated that the evidence seized was a useable quantity of heroin, a narcotic drug. The drug laboratory also confirmed that the substance confiscated was 200 milligrams of heroin, in a useable condition, which sells for approximately twenty dollars.

[3] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[4] A picture introduced in evidence showed a twenty dollar bill on top of a pile of money in that bedroom, which was the drug dealer's bedroom.

¶4 Detective R.P. testified that after entering the residence, he saw defendant standing behind the front door and escorted him outside. He stated that he subsequently found the small baggie of heroin behind that same door.

¶5 After the State rested, defense counsel moved to dismiss the charges pursuant to Arizona Rules of Criminal Procedure (Rule) 20, on the ground that there was insufficient evidence to support convictions. The court denied the motion. The jury found defendant guilty as charged. The trial court sentenced defendant to 3.75 years of imprisonment for possession of drug paraphernalia, with sixty-three days of presentence incarceration credit, to be served concurrently with a ten year term of imprisonment for possession or use of narcotic drugs, also with sixty-three days of presentence incarceration credit.

¶6 Defendant appeals[5] and argues (1) the trial court erred by denying his Rule 20 motion and (2) it was both a denial of his Sixth Amendment right to confront a witness, and fundamental error, for his counsel to stipulate that the substance in evidence was heroin, without testimony from the criminalist who tested the substance.

[5] Although defendant's appeal was initially untimely, the court granted his request to file a delayed appeal.

DISCUSSION

¶7 We review the court's denial of a Rule 20 motion for an abuse of discretion. *State v. Carlos*, 199 Ariz. 273, 276, ¶ 7, 17 P.3d 118, 121 (App. 2001). We will reverse a conviction only if there is a complete lack of substantial evidence to support the charge. *See id.*; *see also* Ariz. R. Crim. P. 20(a).

¶8 Defendant first argues that the trial court erred by denying his Rule 20 motion for acquittal because there was insufficient evidence to convict him of possession of narcotic drugs.[6] "A person shall not knowingly . . . possess or use a narcotic drug." Ariz. Rev. Stat. § 13-3408(A)(1) (2010). Possess means "knowingly to have physical possession or otherwise to exercise dominion or control over property." Ariz. Rev. Stat. § 13-105(34) (Supp. 2011). "One who exercises dominion or control over property has constructive possession of it even if it is not in his physical possession." *State v. Chabolla-Hinojosa*, 192 Ariz. 360, 363, ¶ 13, 965 P.2d 94, 97 (App. 1998).

¶9 The evidence presented at trial revealed that: (1) defendant admitted he went to the house with the intent to

[6] Defendant's argument in his opening brief incorrectly refers to his possession of narcotic drug conviction as a conviction for dangerous drugs. Further, although defendant only specifically argues that there was insufficient evidence to convict him of possession of "dangerous" drugs and not possession of drug paraphernalia, the State construes defendant's argument as pertaining to both counts. We do likewise.

purchase heroin; (2) defendant gave an individual in the house twenty dollars for heroin; (3) a twenty dollar bill was found at the top of a stack of money in the drug dealer's bedroom; (4) a small baggie containing approximately twenty dollars worth of heroin was found in the exact location that defendant had been standing in prior to his arrest; and (5) Detective G.D. testified that no other occupant in the house could have placed or thrown the heroin behind the door where defendant and the heroin were discovered. Thus, there was sufficient evidence to convict defendant of possession of narcotic drugs and the trial court did not err in denying defendant's Rule 20 motion.

¶10 "It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to . . . pack, repack, store, contain, conceal . . . or otherwise introduce into the human body a drug in violation of this chapter." Ariz. Rev. Stat. § 13-3415(A) (2010). The baggie of heroin was discovered in the exact location that defendant had been standing prior to his removal from the house and Detective G.D. stated that no other person could have put the heroin and baggie in the area that defendant and the baggie of heroin were found. The baggie was being used to "store" or "contain" the heroin. *Id*. We therefore conclude that the trial court properly denied defendant's Rule 20 motion and there was sufficient evidence to convict defendant of possession of drug paraphernalia.

¶11 Next, defendant maintains that his Sixth Amendment right to confront a witness was violated because defense counsel and the State stipulated that the substance confiscated from the area defendant had been standing in was heroin. Defendant cites to *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009) as support, which held that the admission of a state laboratory drug analyst's certificate identifying material seized by police and connected to the defendant as cocaine violated the defendant's Sixth Amendment right to confront a witness because the analyst did not testify in person about the substance. *Id*. at 2531-42. Defendant's reliance on this case is misplaced. As Defendant acknowledges, *Melendez-Diaz* clearly stated that "[t]he right to confrontation may, of course, be waived, including by failure to object to the offending evidence[.]" *Id*. at 2534 n.3. Defendant, in this case, not only failed to object to the evidence, he stipulated that it was heroin and that the quantity was a useable amount. We are not aware of any case in which a trial court's acceptance of a defendant's stipulation to the admission of evidence has been found to constitute to fundamental error. *Cf. State v. Logan*, 200 Ariz. 564, 565-66, ¶ 9, 30 P.3d 631, 632-33 (2001) (no reversible error when the party complaining of it invited the error). Accordingly, defendant's argument is devoid of merit.

CONCLUSION

¶12 For the foregoing reasons, we affirm.

_/s/_____
PHILIP HALL, Judge

CONCURRING:

_/s/_____
MARGARET H. DOWNIE, Presiding Judge

_/s/_____
RANDALL M. HOWE, Judge