DIVISION ONE
FILED: 06/17/10
PHILIP G. URRY, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 08-0816
	)	
Appellee,	)	DEPARTMENT E
	)	
v.	)	**MEMORANDUM DECISION**
	)	
JOSEPH RICHARD CASTORINA, SR.,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	
	)	
	)	

Appeal from the Superior Court in Yavapai County

Cause No. P-1300-CR-0020071255

The Honorable Thomas B. Lindberg, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Liza-Jane Capatos, Assistant Attorney General
Attorneys for Appellee

Abigail Jensen, PC — Prescott
Attorney for Appellant

H A L L, Judge

¶1 Defendant, Joseph Richard Castorina, appeals from his convictions for misconduct involving a weapon, possession of

dangerous drugs, possession of narcotic drugs, and possession of drug paraphernalia. He argues (1) that the trial court abused its discretion in denying his Rule 20 motion for judgment of acquittal; (2) that the state's argument regarding the proof required for conviction on the drug charges constitutes fundamental error; and (3) that the trial court abused its discretion in admitting hearsay evidence over his objections. For reasons stated more fully below, we affirm.

FACTS AND PROCEDURAL HISTORY[1]

¶2 Prescott Police Detective M.M. received information concerning suspected drug activity involving defendant at the Twin Lakes Market in Prescott. On June 9, 2003, Department of Public Safety (DPS) Canine Officer J.M. And DPS Narcotics Investigation Unit Detective G.M. met M.M. at the market when M.M. contacted defendant.

¶3 Detective M.M. contacted defendant inside the store and explained that he was there because he had received information regarding "suspected drug sales or use" and that a canine officer was available to "run around . . . or sniff" defendant's vehicle. According to M.M., defendant acted "somewhat blasé," so M.M. began to speak to defendant about what

[1] We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all reasonable inferences against defendant. *State v. Vandever*, 211 Ariz. 206, 207 n.2, 119 P.3d 473, 474 n.2 (App. 2005).

he or the other officers might find. Initially, defendant did not respond, but eventually he stated that the dog "may hit on some medication that was within the motor vehicle."

¶4 Officer J.M. released his dog, who alerted to the doors of the defendant's Dodge pickup truck that was parked outside the market. J.M. and G.M. then searched the pickup truck and found an unlabelled plastic, prescription-type pill bottle and a loaded .22-caliber revolver in a holster on the passenger seat of the vehicle. The plastic pill bottle was "two thirds full" and contained fifteen different types of pills of varying shape, size, and color, for a total of 106 pills in all.

¶5 When M.M. asked defendant where the pills came from and why he had them, defendant replied that some were pills that he had been prescribed and some were given to him by a woman named S.W. who was now deceased. Defendant was not able to tell M.M. which pills were his and which ones S.W. had given him. At some point, defendant volunteered that he had the pills in his truck because he "didn't want his pills at the house, around his kids." Defendant also told M.M. that he had "no idea" what the pills were. When M.M. asked defendant why he had not destroyed the pills or simply flushed them down the toilet if he did not know what they were for or to whom they belonged, defendant did not respond.

¶6 M.M. did not arrest defendant on June 9 but informed defendant that he was going to conduct further investigation into the nature of the drugs. When M.M. told defendant that he was going to contact his physician, defendant stated the he would "get the prescription documentation" for him.

¶7 An eventual review and analysis of the tablets by the DPS Crime Lab determined that some of the drugs contained in the pill bottle were dangerous drugs and/or narcotic drugs requiring a valid prescription. In August 2007, the state charged defendant with Count 1, misconduct involving a weapon, a class four felony; Count 2, possession of a dangerous drug, clonazepam, a class four felony; Count 3, possession of a dangerous drug, lorazepam, a class four felony; Count 4, possession of a dangerous drug, alprazolam, a class four felony; Count 5, possession of a narcotic drug, morphine, a class four felony; Count 6, possession of a narcotic drug, hydrocodone, a class six felony; Count 7, possession of a narcotic drug, oxycodone; and Count 8, possession of drug paraphernalia, a class six felony.[2] At the conclusion of a three-day trial in

[2] Defendant was initially charged with one count of misdemeanor possession of prescription drugs in Prescott Justice Court, but this charge was dismissed when it was discovered that the possessed drug warranted felony charges and the matter was submitted to the Yavapai County Attorney. Three similar charges arising from events on August 19, 2005 were initially charged with the offenses in this case but were dismissed without prejudice prior to the trial in this case.

August 2008, a jury found defendant guilty of all of the offenses as charged.

¶8 On September 15, 2008, the trial court sentenced defendant to three years of supervised probation on all counts. Defendant timely appealed. This court has jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1) (2003), 13-4031 and 13-4033(A)(1) (2010).

DISCUSSION

1. Admission of Hearsay Evidence/Identidex Database

¶9 A DPS criminalist testified at trial that he had examined the tablets contained in the pill bottle located in defendant's truck. He testified that he had determined the identity of the majority of the tablets by comparing their shape, size, color, and particular "imprint" or "code" against information contained in a pharmaceutical database known as Identidex. He explained that DPS subscribed to the Identidex database, that the database was maintained by a number of pharmaceutical companies, and that it was updated quarterly. Based on his comparisons, he had identified all fifteen types of tablets found in defendant's pill bottle from the information obtained through the Identidex. In addition, he ran tests on two of the tablets that confirmed their identity as indicated by Identidex: a Gas Chromatography/Mass Spectrometry analysis

revealed that one set of pills was oxycodone, and a Fourier Transform Infrared Instrument analysis confirmed that another set was carisoprodol.

¶10 Over defendant's hearsay objections based on reliance on Identidex information, the trial court admitted the criminalist's testimony and the report of his findings into evidence. Defendant does not argue that the Identidex identifications were insufficient evidence to establish the identity of the pills defendant possessed. Rather, defendant maintains that the admission of the criminalist's Identidex-based testimony and report was an abuse of the trial court's discretion.

¶11 We review the admission or exclusion of evidence for abuse of discretion. *State v. Tankersley*, 191 Ariz. 359, 369, ¶ 37, 956 P.2d 486, 496 (1998). We "will not reverse the [trial] court's rulings on issues of the relevance and admissibility of evidence absent a clear abuse of its considerable discretion." *State v. Alatorre*, 191 Ariz. 208, 211, 953 P.2d 1261, 1264 (App. 1998) (citation omitted). We find no abuse of discretion here.

¶12 Rule 703 of the Arizona Rules of Evidence permits the admission of data relied upon by an expert in reaching an opinion if it is of the type reasonably relied upon by experts in the particular field. The criminalist testified that

Identidex is routinely relied upon by the DPS crime lab to perform preliminary "examinations" of medication or tablets and that the database is routinely updated. He testified that the tablets he compared against the database did not appear to have been tampered with or altered. He also explained that every medication has only one "imprint" and that, in this case, all of the imprints corresponded to only one possible substance. The criminalist testified that in his opinion the pills "should or could be" certain dangerous drugs based on Identidex, but that he could not "confirm" the identity of those pills he had not tested with other methods.

¶13 Nevertheless, the criminalist relied on Identidex in reaching his preliminary opinion. The distinction between a preliminary indication based on Identidex and a laboratory confirmation concerns the *weight* of the testimony on the pills' composition, which defendant does not challenge, rather than its *admissibility*. Accordingly, the trial court did not abuse its discretion by admitting the criminalist's testimony regarding his findings and the basis for them. Further, we conclude that the court did not abuse its discretion by admitting the criminalist's report into evidence under Rule 703, which allows otherwise inadmissible facts or data to be disclosed to the jury by the opinion's proponent if "the court determines that their

probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect."

2. Denial of Rule 20 Motion

¶14 Both at the end of the state's case and the end of the defense case, defendant moved for a judgment of acquittal, arguing that the state had failed to present sufficient evidence that defendant "knew" the nature of the drugs he possessed. Defendant based his argument in part on the fact that he had repeatedly told the officers that he did not know what the pills were and that even the officers could not tell what they contained when they first located them. The trial court denied the motion, finding that the state had presented "substantial evidence" from which "reasonable men [could] differ about the evidence and quality of it" in reaching a decision as to whether defendant was guilty beyond a reasonable doubt. On appeal, defendant argues that this was an abuse of the trial court's discretion. We find no abuse of discretion.

¶15 Rule 20 requires a trial court to enter a judgment of acquittal before a verdict is rendered "if there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(a). We review a trial court's denial of a Rule 20 motion for an abuse of discretion. *State v. Latham*, 223 Ariz. 70, 72, ¶ 9, 219 P.3d 280, 282 (App. 2009). We will reverse a trial court's denial of a motion for acquittal only if we find that no

substantial evidence supports the conviction. *State v. Henry*, 205 Ariz. 229, 232, ¶ 11, 68 P.3d 455, 458 (App. 2003) (citation omitted).

¶16 Substantial evidence may be either circumstantial or direct, and is evidence that a reasonable jury may accept as sufficient to infer guilt beyond a reasonable doubt. *Id*. Moreover, it is well established that a conviction may be sustained on circumstantial evidence alone. *State v. Blevins*, 128 Ariz. 64, 67, 623 P.2d 853, 856 (App. 1981). Furthermore, there is no distinction between the probative value of direct or circumstantial evidence. *State v. Bible*, 175 Ariz. 549, 560 n.1, 858 P.2d 1152, 1163 n.1 (1993). If reasonable minds can differ in the inferences to be drawn from the evidence, a trial court must submit the case to the jury. *Henry*, 205 Ariz. at 232, ¶ 11, 68 P.3d at 458.

¶17 The parties acknowledge that, in order to prove that a defendant knowingly possesses a narcotic drug or a dangerous drug in Arizona, the state is required to show, not only that a defendant knowingly possessed the drug, but also that the defendant knew the drug he possessed was a narcotic or dangerous drug and not merely an "illegal substance." *See, e.g., State v. Diaz*, 166 Ariz. 442, 445, 803 P.2d 435, 438 (1990) (state required to show defendant knew that what he was transporting was narcotic drug, not illegal substance), *vacated in part on*

other grounds, 168 Ariz. 363, 813 P.2d 728 (1991); *State v. Pawley*, 123 Ariz. 387, 393, 599 P.2d 840, 846 (App. 1979) (no error in denying motion for acquittal where reasonable minds could differ on whether defendant was aware of narcotic character of tablets possessed); *State v. Norris*, 221 Ariz. 158, 161, ¶ 8, 211 P.3d 36, 39 (App. 2009) (state must prove defendant knew drug was marijuana in order to convict defendant of marijuana-related offense). However, it is sufficient for the state to show that defendant knew he possessed a narcotic or dangerous drug; neither our statutes nor case law require the state to prove that defendant knew which *particular* drug defined under our laws as a "dangerous" drug or "narcotic" drug he knew he possessed. *See, e.g., State v. Salinas*, 181 Ariz. 104, 106, 887 P.2d 985, 987 (1994) (elements of possession of narcotic drug for sale include exercise of dominion or control over substance, knowledge substance is present, *knowledge substance is a narcotic*, possession of substance for purpose of sale). The element of knowledge can be proven by evidence showing that the defendant was aware of the high probability that the packages contained a narcotic or dangerous drug and that he acted with a conscious purpose to avoid learning the true nature of the substance. *See Diaz*, 166 Ariz. at 445, 803 P.2d at 438.

¶18 The evidence at trial was that the pill bottle contained, among other medication, the dangerous drugs

clonazepam, lorazepam, and alprazolam, and the narcotic drugs, morphine, hydrocodone, and oxycodone. Defendant contends that the only evidence of his knowledge of the pills in the truck was "his repeated denials that he did *not* know what they were" and that a few "ambiguous statements" made by him on an interview tape that could be "as easily interpreted" as indications that he did not know. This last argument concedes the fact that his statements could therefore "as easily be interpreted" as indicating that defendant *did* know. The "ambiguous statements" to which defendant alludes are his comments to M.M. in an interview on August 22, 2005,[3] in which defendant variously told M.M. that the pills were "ninety percent innocuous" or "half innocuous" or that he "had a prescription for all but one of the pills" but that he did not know "where it came from." Defendant also informed M.M. that he obtained some of the pills when he worked at the Veteran's Hospital if patients left them behind; that, had he known what the pills were, he would have sold them or used them; and that the fact that he still had them meant he did not intend to do anything with them. As defendant acknowledges, the very fact that "reasonable minds" could have interpreted these statements either way signifies that the trial

[3] A tape of the interview was played for the jury at trial and made available to them in the jury room.

court committed no error in submitting the case to the jury. *Henry*, 205 Ariz. at 232, ¶ 11, 68 P.3d at 458.

¶19 Furthermore, the record establishes that there was additional evidence from which the jury could have inferred that defendant knew that the drugs he possessed were narcotic and/or dangerous drugs. Paramount among these is M.M.'s testimony that defendant volunteered that the dog might "hit on some medication that was in the vehicle" prior to the drug canine sniff of his pickup. Also included is the evidence that, although defendant professed to have prescriptions for most of the medications that he would provide to Officer M.M., he never did so; the testimony that Officer M.M. could find no trace of an individual named S.W. in Yavapai County; and the testimony that defendant kept the drugs with him because he "wanted to keep them away from his kids."

¶20 Based on the totality of this circumstantial evidence, and despite defendant's protestations to the contrary, reasonable jurors could have inferred that defendant knew that the pills contained in his pill bottle were narcotic and/or dangerous drugs. Our supreme court has characterized the issue of whether a defendant acts "knowingly and intentionally" as a judgment of his credibility for the jury to make. *State v. Fierro*, 220 Ariz. 337, 339, ¶¶ 8-9, 206 P.3d 786, 788 (App. 2008) (citation omitted). The trial court in this case did not

abuse its discretion in denying defendant's Rule 20 motion and submitting this matter to the jury.

3. Improper Legal Argument

¶21 Prior to closing arguments, the prosecutor noted that, contrary to defense counsel's thesis, the state was not required to prove that defendant knew that defendant possessed the drugs "by name" (i.e., alprazolam) but only that defendant knew "the illegal nature of the drugs" he possessed. The prosecutor cited *Pawley* in support of his argument. Defense counsel disagreed that *Pawley* supported the state's position, but stated, "By all means, [the prosecutor] can put his spin on the law and I will just sleep through it."

¶22 During his closing argument, the prosecutor then argued to the jury that the state did not have to prove that the defendant knew whether the particular drug he possessed fell within the category of dangerous drugs or narcotic drugs under Arizona law in order to prove that he knowingly possessed a dangerous drug. He argued that, for example, a defendant who intended to buy cocaine, a narcotic drug, who was given methamphetamine instead, a dangerous drug, could not escape criminal culpability by arguing that he did not knowingly intend to possess a dangerous drug, only a narcotic one. According to the state, it was enough to prove that defendant knew that he possessed "something illegal."

¶23 On appeal, the state acknowledges that this argument was improper in that it misstated the law, but contends that any error was "invited error" because defense counsel acquiesced to the argument. It maintains that we should refuse to address this issue on appeal on that basis alone. *See State v. Logan*, 200 Ariz. 564, 565-66, ¶ 9, 30 P.3d 631, 632-33 (2001) (holding reviewing court will not find reversible error when party complaining invited it). We find this argument disingenuous.

¶24 It is evident throughout the trial that defense counsel disagreed with the prosecutor's theory of what the state had to show to prove "knowing possession" of the drugs. Indeed, that ongoing debate is in fact the reason the prosecutor raised the issue in advance of his closing argument, citing *Pawley* and reiterating his understanding of what the law required. We view defense counsel's statement that the prosecutor could "put his spin on the law" as evidence of counsel's frustration, not evidence that he suddenly agreed with the prosecutor's interpretation.

¶25 We disagree, however, with defense counsel's contention that the prosecutor's misstatement of the law was ethical or prosecutorial "misconduct" requiring reversal in this case. "Prosecutorial misconduct 'is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the

prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial.'" *State v. Aguilar*, 217 Ariz. 235, 238-39, ¶ 11, 172 P.3d 423, 426-27 (App. 2007) (quoting *Pool v. Superior Court*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984)). In this case, the prosecutor could have properly challenged defendant's testimony that he was ignorant of the specific types of substances in his pill vial by pointing out that the jury could reject the testimony based on defendant's lack of credibility, *Pawley*, 123 Ariz. at 393, 599 P.2d at 846, or if he was aware of the high probability that the vial contained narcotic drugs but acted with a conscious purpose to avoid learning the pills' true contents, *see Fierro*, 220 Ariz. at 339, ¶ 6, 206 P.3d at 788. Although the actual argument made by the prosecutor was similar to the jury instruction we rejected in *Diaz*, it amounts to mere legal error or mistake rather than the type of intentional conduct that would warrant reversal.

¶26 Moreover, the prosecutor's misstatement was harmless. Error is harmless only if "we can say, beyond a reasonable doubt, that it 'did not contribute to or affect the verdict.'" *State v. Green*, 200 Ariz. 496, 501, ¶ 21, 29 P.3d 271, 276 (2001) (quoting *Bible*, 175 Ariz. at 588, 858 P.2d at 1191). The inquiry on review "is not whether, in a trial that occurred

without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *State v. Eastlack*, 180 Ariz. 243, 251, 883 P.2d 999, 1007 (1994) (citing *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993)).

¶27 Initially, we note that the trial court instructed the jury that what the lawyers said in their closing arguments about the law or evidence was not itself evidence. Jurors are presumed to follow the court's instructions. *State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996).

¶28 Most importantly and despite the prosecutor's arguments, the record shows that the trial court in this case instructed the jury that it had to find that the state had proven, beyond a reasonable doubt, that the defendant knowingly possessed or used "a dangerous drug, to wit: Clonazepam and/or Lorazepam and/or Alprazolam" and knowingly possessed or used "a narcotic drug, to wit: Morphine and/or Hydrocodone and/or Oxycodone." Furthermore, the jury verdicts specifically indicate that the jury found that defendant possessed or used "a dangerous drug, to wit, Clonazepam (Count 2); "a dangerous drug, to wit, Lorazepam" (Count 3); "a dangerous drug, to wit, Alprazolam" (Count 4); "a narcotic drug, to wit, morphine" (Count 5); "a narcotic drug, to wit, Hydrocodone" (Count 6); and "a narcotic drug, to wit, Oxycodone" (Count 7). As the state

observes, the trial court's instructions went beyond the requirement of the statutes by instructing the jury that it had to find that the state had proved the defendant knew he possessed the actual named drug in each count. Consequently, the jury's verdicts reflect the fact that they found, beyond a reasonable doubt, that defendant knew the specific nature of the substances he possessed. We are therefore convinced, beyond a reasonable doubt, that the prosecutor's misstatements regarding the law did not contribute to or affect the jury's verdict. *Green*, 200 Ariz. at 501, ¶ 21, 29 P.3d at 276.

CONCLUSION

¶29 For the reasons stated above, we affirm defendant's convictions and sentences.

/s/
PHILIP HALL, Judge

CONCURRING:

/s/
SHELDON H. WEISBERG, Presiding Judge

/s/
JOHN C. GEMMILL, Judge