DIVISION ONE
FILED: 06-01-2010
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 09-0439
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
MICHAEL DEAN KITSON,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	
	)	
	)	

Appeal from the Superior Court in Mohave County

Cause No. CR-2008-1204

The Honorable Steven F. Conn, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

Jill L. Evans, Mohave County Appellate Defender — Kingman
Attorney for Appellant

Michael Dean Kitson — Winslow
Appellant

S W A N N, Judge

¶1 Michael Dean Kitson ("Appellant") appeals from his convictions of possession of dangerous drugs for sale, a violation of A.R.S. § 13-3407(A)(2) and a class 2 felony; possession of marijuana, a violation of A.R.S. § 13-3405(A)(1) and a class 6 felony; and two counts of possession of drug paraphernalia, violations of A.R.S. § 13-3415(A) and class 6 felonies. His appeal was filed in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969).

¶2 Counsel for Appellant has searched the record and can find no arguable question of law that is not frivolous, and requests that we search the record for fundamental error. Appellant filed a supplemental brief *in propria persona* and raised the following issues: (1) the jury was incorrectly informed that a person could "get 50 hits off a gram" of methamphetamine; (2) the officer told the jury that the police had Appellant's house under surveillance and witnessed no illicit activity; (3) there was no controlled buy; (4) there were no eyewitness accounts to indicate a drug transaction; (5) the amount of drugs seized indicates that the drugs were for personal use; (6) the baggies seized were merely sandwich bags; (7) Appellant's scale was used to ensure he was not short-changed when he purchased his drugs; (8) during closing arguments, the prosecutor told the jury Appellant had "two years

worth of dope"; and (9) ineffective assistance of counsel. After reviewing the record, we affirm Appellant's convictions and sentences.

Factual[1] and Procedural Background

¶3 On October 10, 2008, after conducting surveillance on Appellant, officers executed a search warrant on his residence in Bullhead City, Arizona.[2] Upon discovery of illegal substances and contraband, Appellant was arrested and charged with possession of dangerous drugs for sale, possession of marijuana and two counts of possession of drug paraphernalia.

¶4 A two-day trial commenced on April 14, 2009. A Bullhead City narcotics detective testified that the following items were seized during the search of Appellant's home: (1) two glass vials, presumed to contain methamphetamine; (2) a syringe; (3) a surveillance camera and a monitor; (4) an empty brown glass vial; (5) clear plastic baggies; (6) a metal canister with gram scale weights; (7) three cell phones; (8) 7.5 grams of marijuana in a plastic container; (9) two bottles of

[1] "We view the evidence in the light most favorable to sustaining the verdicts and resolve all inferences against appellant." *State v. Nihiser*, 191 Ariz. 199, 201, 953 P.2d 1252, 1254 (App. 1997)

[2] Appellant's elderly, disabled mother also lived at the residence and was present during the search.

lidocaine; (10) five unknown pills; (11) two marijuana pipes;[3] (12) a marijuana grinder coated with marijuana residue; (13) a metal safe and (14) a wooden box inside the metal safe, which contained three brown glass vials holding methamphetamine, two digital scales, a manual scale, a glass pipe coated with methamphetamine residue, three wood marijuana pipes coated with marijuana residue, seven used syringes, and four baggies holding methamphetamine and methamphetamine residue. A syringe, two glass vials, and $426 were also found in Appellant's pocket at the time of his arrest.[4]

¶5 The detective testified that he had never participated in a case where a person had between five and nine grams of methamphetamine and he or she was not selling the drug. In contrast, he testified, a person with drugs for personal use will typically have a gram or less. He also explained the significance of the scales, gram scale weights, and the

[3] When the prosecutor asked the detective how he knew that the pipes were marijuana pipes, he responded that "they are very distinguishable." He explained that he knew the substance was marijuana because "[m]arijuana smells like marijuana. Nothing else smells like marijuana; and it's very easy through experience and training, what marijuana smells like." When he was recalled to testify, the detective explained that he knew the plastic container contained marijuana because based on his training and experience, "[m]arijuana only smells and appears like marijuana."

[4] The detective also testified that when Appellant was asked by his mother if the drugs belonged to him, he responded that they did.

importance of calibrating the scales: "As with any business . . . if you have a product, you want to make sure that you're not giving away any bits of your product for free." He also pointed out that a scooper -- a paper placed on top of a scale that is used to assist in transferring the product to and from the scale -- was found on top of one of the digital scales that was seized. With respect to the surveillance equipment, the detective explained that people generally use such equipment to provide advance notice of police arrival.

¶6 After explaining the various ways a person might introduce methamphetamine into the body, the detective testified that there was a glass pipe found that appeared to have a burned residue of methamphetamine. Additionally, there were ties found at the scene, which can be used to expose a vein before injecting methamphetamine. He also testified that a used syringe was collected at the scene.

¶7 As a result of the search, a criminalist received a request to analyze several of the items seized: five glass vials containing a crystalline substance or residue and two plastic vials containing clear liquid. She testified that the results of the test indicated that three of the glass vials contained a combined weight of 8.34 grams of methamphetamine,[5] one glass vial

[5] At trial, the detective testified that the total combined weight of the methamphetamine and the vials was 32.3 grams.

contained methamphetamine residue, and the plastic vials contained lidocaine. She also testified that based on her experience and training, a person could take 100 usable "hits" from one gram of methamphetamine.[6]

¶8 At the conclusion of the State's case-in-chief, defense counsel moved, pursuant to Rule 20, for a directed verdict on count 1, possession of dangerous drugs for sale. He argued that there was no substantial evidence of Appellant's intent to sell the methamphetamine. The court denied the motion and stated that there was sufficient evidence to allow the case to go forward to the jury. Noting that the Rule 20 motion was made only with respect to count 1, the court reasoned that while each item standing alone could be evidence of something other than intent to sell, the combination of the amount of methamphetamine, the scales, the baggies, and the money found in

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Without the vials, the detective estimated that the total weight of methamphetamine seized was 17 grams. During his examination of the detective, the prosecutor repeatedly implied that 32 grams of methamphetamine were seized. The trial court admonished him: "I know we have gone down this road before . . . . It's clear from his testimony that this is not 32 grams of methamphetamine; it's 32 grams of methamphetamine plus glass." Later when the prosecutor again referred to the amount as 32 grams, defense counsel objected and the court sustained the objection and again admonished the prosecutor.

[6] In contrast, the detective testified, based on his training and experience, that a person could take 50 "hits" per gram of methamphetamine.

Appellant's pocket was sufficient circumstantial evidence. Thereafter, the defense rested.

¶9 During closing arguments, defense counsel suggested that Appellant purchased his drugs in bulk -- one month at a time -- for his own personal use. In his rebuttal argument, the prosecutor stated that 8.34 grams is "a lot of methamphetamine. And if he's coming here today to say oh, well, this is all for personal use, you know, *he wants to hoard up for a couple years worth of meth*, well, he also told you, don't leave your common sense; and I'm saying to you now, that just doesn't make any sense." (Emphasis added.) Defense counsel did not object to this characterization of Appellant's buying habits.

¶10 A jury convicted Appellant of the following: count 1, possession of dangerous drugs for sale (methamphetamine); count 2, possession of drug paraphernalia (methamphetamine); count 3, possession of marijuana; and count 4, possession of drug paraphernalia (marijuana). The court sentenced Appellant to a mitigated term of seven years imprisonment with credit for 75 days presentence incarceration for count 1, and a term of nine months imprisonment for each of the remaining counts. It ordered the sentences to be served concurrently. The court stated on the record its reasoning for imposing the sentence. It considered as an aggravator Appellant's 1995 Nevada felony conviction for possession of a controlled substance with intent

to sell (methamphetamine). But it considered the "relatively minor amount of drugs that were involved" as a mitigating factor, and found the mitigating factor outweighed the aggravating factor. With respect to count 1, the trial court elected to use the minimum term of five years imprisonment (not the presumptive term) as its starting point to determine the term of imprisonment.[7] Because of Appellant's prior felony conviction, however, the court felt it was inappropriate to treat Appellant as if he had no prior criminal history, and therefore added two years of imprisonment to the minimum five-year term.

¶11 Appellant timely appeals. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033(A)(1).

Discussion

1. Sufficiency of the Evidence

¶12 We construe the first seven issues raised in Appellant's supplemental brief as an argument that there was insufficient evidence to support the verdicts.

[7] Pursuant to A.R.S. § 13-709.03(A), the presumptive term of imprisonment for a person convicted of possession of dangerous drugs (methamphetamine) is ten years, with a minimum term of five years and a maximum term of fifteen years. Though we do not approve of the court's automatic downward departure from the presumptive term, that error redounds to Appellant's benefit.

¶13 When reviewing a denial of a motion for judgment of acquittal pursuant to Ariz. R. Crim. P. 20, "we view the evidence in the light most favorable to sustaining the verdict and reverse only if no substantial evidence supports the conviction. Substantial evidence . . . is such proof that reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt." *State v. Pena*, 209 Ariz. 503, 505, ¶ 7, 104 P.3d 873, 875 (App. 2005) (citations omitted) (internal quotation marks omitted). With respect to the conviction for possession of dangerous drugs for sale, we review the sufficiency of the evidence for an abuse of discretion. *See State v. Morris*, 215 Ariz. 324, 333, ¶ 33, 160 P.3d 203, 212 (2007). But with respect to the remaining convictions, we review for fundamental error, as the Rule 20 motion was not directed at these counts. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005) (an issue not raised at trial is waived absent fundamental error).

a. Methamphetamine

¶14 Pursuant to A.R.S. § 13-3407(A)(2), "[a] person shall not knowingly . . . [p]ossess a dangerous drug for sale." The evidence presented at trial demonstrated that Appellant admitted to possession of drugs, and the detective testified that the quantity of methamphetamine seized indicated that it was for

sale, rather than for personal use. This, in conjunction with the money found in Appellant's pocket, the surveillance equipment and the scales, provided sufficient evidence from which a reasonable jury could find that Appellant knowingly possessed methamphetamine with the intent to sell as required by A.R.S. § 13-3407(A)(2).

¶15 Appellant contends, however, that there are reasonable alternative explanations for the presence of the baggies, the scales, and the amount of methamphetamine. He argues that the baggies were merely sandwich bags, and that the scales were used to guard against being short-changed when he purchased his monthly supply of methamphetamine for personal use. With respect to the quantity of methamphetamine, Appellant disputes the evidence presented at trial that indicated a person could "get 50 hits off of a gram of [methamphetamine]." He explains that "[a] smoker will smoke at least a quarter gram to get high giving them . . . three or four highs per gram." But because he was a "shooter," he was able to get "two and a half highs per gram[,] keeping [him] high [for] two and a half days." He also notes that while he was under surveillance, none of the officers observed him selling drugs and there was no controlled buy.

¶16 To be sure, a controlled buy or other direct evidence would have bolstered the State's case with respect to the charge of possession of dangerous drugs for sale. But when reviewing

for sufficiency of the evidence, we make no distinction between direct and circumstantial evidence. *See State v. Stuard*, 176 Ariz. 589, 603, 863 P.2d 881, 895 (1993). And we do not reweigh evidence on appeal. *State v. Tison*, 129 Ariz. 546, 552, 633 P.2d 355, 361 (1981).

b. Marijuana

¶17 Pursuant to A.R.S. § 13-3405(A)(1), "[a] person shall not knowingly . . . [p]ossess or use marijuana." At trial, the detective testified that one of the substances seized was marijuana. And when asked by his mother whether the drugs were his, Appellant responded that they were. While there was no laboratory analysis conducted on the substance purported to be marijuana, we conclude that based on the circumstantial evidence provided and the officer's testimony concerning his experience in identifying marijuana, a reasonable jury could find sufficient evidence that Appellant knowingly possessed marijuana. *See State v. Ampey*, 125 Ariz. 281, 282, 609 P.2d 96, 97 (App. 1980) (holding that an officer's report and defendant's admission was sufficient evidence from which a jury could convict, even absent a chemical analysis indicating that the substance was marijuana).

c. Drug Paraphernalia

¶18 A.R.S. § 13-3415 provides, in relevant part:

> A. It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a drug in violation of this chapter.

To determine whether an item constitutes drug paraphernalia, a court may consider "[t]he existence of any residue of drugs on the object," as well as "[e]xpert testimony concerning its use." A.R.S. § 13-3415(E)(5), (14). There was ample evidence presented at trial to demonstrate that Appellant possessed marijuana paraphernalia, including a plastic canister to store his marijuana, three wooden pipes with marijuana residue, and a grinder with marijuana residue. With respect to methamphetamine paraphernalia, the detective testified that ties can be used to assist a person when injecting methamphetamine into his or her system. Although the syringes were not tested to determine if they contained methamphetamine residue, the close proximity of the seven syringes to the methamphetamine found in the wooden box constituted evidence that the syringes were used to inject the drug into Appellant's system.[8] *See* A.R.S. § 13-3415(E)(4). A reasonable jury, therefore, could find that pursuant to A.R.S. § 13-3415(A), Appellant possessed marijuana and methamphetamine paraphernalia.

[8] Indeed, in his Supplemental Brief, Appellant explains that he "was a shooter" -- implying that he used syringes to inject methamphetamine into his body.

2. Prosecutorial Misconduct

¶19 Next, Appellant contends that during closing arguments, the prosecutor improperly stated that Appellant had "two years worth of dope." We construe this to be an argument alleging prosecutorial misconduct.

¶20 "When a timely objection is made, reversal is warranted if 'a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying the defendant a fair trial.'" *State v. Speer*, 221 Ariz. 449, 458, ¶ 42, 212 P.3d 787, 796 (2009). Absent such objection, our review is limited to fundamental error. *Id.* To establish fundamental error, Appellant must demonstrate that fundamental error occurred and that it caused him prejudice. *Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607.

¶21 "Prosecutorial misconduct sufficient to justify reversal must be 'so pronounced and persistent that it permeates the entire atmosphere of the trial.'" *State v. Lee*, 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997) (citation omitted). 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." *Pool v. Superior*

Court (State), 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984) (footnote omitted). To determine whether the alleged misconduct constitutes fundamental error, we focus on "the probability it influenced the jury and whether the conduct denied the defendant a fair trial." *State v. Wood*, 180 Ariz. 53, 66, 881 P.2d 1158, 1171 (1994); *accord State v. Zinsmeyer*, 222 Ariz. 612, 620, ¶ 16, 218 P.3d 1069, 1077 (App. 2009).

¶22 There was no evidence admitted at trial that Appellant would be able to extend his use of 8.34 grams of methamphetamine over the course of two years. While the prosecutor may have engaged in hyperbole, there was no evidence that he intentionally engaged in the improper conduct or that he did so with indifference or the specific intent to prejudice Appellant. *See State v. Roque*, 213 Ariz. 193, 228, ¶ 155, 141 P.3d 368, 403 (2006). We discern no fundamental error.

3. Ineffective Assistance of Counsel

¶23 Next, Appellant contends that if his counsel had "known what he was doing," he is sure that the jury's "verdict would have been[] not guilty of sales." We do not consider claims of ineffective assistance of counsel on direct appeal, regardless of merit. *See State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002). Such claims must be presented to the trial court in a petition for post-conviction relief. *Id.*

4. Sentencing

¶24 Although it was not raised on appeal, our review of the record reveals an issue with respect to sentencing. Rather than using the presumptive term of ten years as the starting point, the trial court instead used the five-year minimum term as the benchmark. While the court's method of determining the term of imprisonment is not what the Legislature envisioned when it enacted A.R.S. § 13-709.03(A) and established ten years as the presumptive term of imprisonment, Appellant clearly was not prejudiced by this approach. And, as the State has not appealed or cross-appealed, we do not have subject matter jurisdiction to consider this issue further. *See State v. Dawson*, 164 Ariz. 278, 281-82, 792 P.2d 741, 744-45 (1990).

Conclusion

¶25 We have reviewed the record for fundamental error and find none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. Accordingly, we affirm Appellant's convictions and sentences. Defense counsel's obligations pertaining to this appeal have come to an end. *See State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Unless, upon review, counsel discovers an issue appropriate for petition for review to the Arizona Supreme Court, counsel must only inform Appellant of the status of this appeal and his future options. *Id.* Appellant has thirty days from the date of this decision to file a

petition for review *in propria persona*. *See* Ariz. R. Crim. P. 31.19(a). Upon the court's own motion, Appellant has thirty days from the date of this decision in which to file a motion for reconsideration.

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
PATRICIA K. NORRIS, Presiding Judge

/s/
_____
DANIEL A. BARKER, Judge