DIVISION ONE
FILED: 12/30/2010
RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 09-0701
	)	
Appellee,	)	DEPARTMENT E
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
EDWARD GRANT WELCH,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	
	)	
	)	

Appeal from the Superior Court in Yavapai County

Cause No. P-1300-CR-0020081334

The Honorable William T. Kiger, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Suzanne M. Nicholls, Assistant Attorney General
Attorneys for Appellee

John David Napper — Prescott
Attorney for Appellant

S W A N N, Judge

¶1 Edward Grant Welch appeals his convictions for importation of marijuana, possession of marijuana and possession

of drug paraphernalia. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY[1]

¶2 On October 2, 2008, police intercepted a suspicious package addressed to Welch's wife at their home address in Black Canyon City and discovered the package contained "a little under three pounds" of high-grade marijuana worth about $18,000. The return address on the package identified the sender as Rick Spaine of Hayfork, California, whom Welch described to police as a lifelong friend. The package contained a note:

> Hey Babe! I need you to keep 2500 to put in land fund. The rest comes back same as last! Also please include Vitamin B complex I'm out! Whooo hooooo! Love ya!

Welch told the investigating officer that his wife had been in California for about a month, he was in daily telephone phone contact with her, and it "was kind of obvious" that she had sent him the package. He also told the officer that he had a prescription for marijuana, smoked it almost every day, and had about an ounce of marijuana in his house. He explained that the marijuana in the package was for his and his wife's personal use.

¶3 On October 22, 2008, Welch consented to a search of his home and officers found pipes used to smoke marijuana, and a

[1] We view the evidence in the light most favorable to supporting the conviction. *State v. Moody*, 208 Ariz. 424, 435 n.1, ¶ 2, 94 P.3d 1119, 1130 n.1 (2004).

grinder containing a usable amount of marijuana. They also found a journal in which Welch had written the month before that his wife was "up in Hayfork trimming her big heart out,"[2] and $2,845 cash in envelopes, much of it in twenty dollar bills.[3] Welch told an officer that the money was for the "land fund," to buy land in Hayfork from Spaine, from which to harvest and sell marijuana.

¶4 The jury convicted Welch of importation of marijuana, as specified on a special verdict form, and possession of marijuana, and possession of drug paraphernalia. The court sentenced him to three years in prison on the importation offense, and to one year on each of the possession offenses, with the sentences to be served concurrently. Welch timely appeals. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031 and -4033.

DISCUSSION

¶5 Welch asserts that the trial court abused its discretion in denying his motion to sever the possession charges from the charge of importation, and in denying his motion for judgment of acquittal on the charges of importation and

[2] "Trimming" is a word used to describe harvesting buds of marijuana.

[3] An officer testified at trial that it is common practice to sell bags containing an eighth of an ounce of high-grade marijuana for forty dollars.

possession of marijuana.

I. SEVERANCE

¶6 Before trial, Welch moved to sever the transportation for sale/importation charge from the possession charges. After oral argument, the trial court denied the motion, reasoning that "there is enough of a nexus of a same conduct or connected with the commission of a crime that it is enough of a common scheme." The court noted, however, that the ruling was open to reconsideration at any time. At trial, Welch re-urged the motion for severance following opening statements and initial testimony from an investigating officer, and the court reaffirmed its denial.[4]

¶7 Under Ariz. R. Crim. P. ("Rule") 13.3(a), offenses may be joined when they

> 1. Are of the same or similar character; or
> 2. Are based on the same conduct or are otherwise connected together in their commission; or
> 3. Are alleged to have been a part of a common scheme or plan."

[4] A motion to sever must be made at least twenty days before trial or at the omnibus hearing, and, "if denied, renewed during trial at or before the close of the evidence." Rule 13.4(c). "Severance is waived if a proper motion is not timely made and renewed." *Id.* We need not decide whether Welch waived any error by failing to renew his motion "at or before the close of evidence" because we find no error, much less fundamental error, in the judge's failure to sever the charges.

When, however, it is "necessary to promote a fair determination of the guilt or innocence of any defendant of any offense, the court may on its own initiative, and shall on the motion of a party, order . . . severance." Rule 13.4(a). We will not reverse the trial court's denial of a motion to sever absent a clear abuse of discretion. *State v. Prince*, 204 Ariz. 156, 159, ¶ 13, 61 P.3d 450, 453 (2003).

A. Rule 13.3(a)(1)

¶8 As Welch concedes, the transportation for sale/importation offense was properly joined with the possession offenses because they were of the "same or similar character" under Rule 13.3(a)(1) -- that is, all were related to the possession of marijuana. But a defendant is "entitled as of right to sever offenses joined only by virtue of Rule 13.3(a)(1), unless evidence of the other offense or offenses would be admissible under applicable rules of evidence if the offenses were tried separately." Rule 13.4(b). A denial of a motion to sever under Rule 13.4(b) "is reversible error only if the evidence of other crimes would not have been admitted at trial for an evidentiary purpose anyway." *State v. Aguilar,* 209 Ariz. 40, 51, ¶ 38, 97 P.3d 865, 876 (2004) (citation and internal quotation marks omitted).

¶9 Here, evidence of each offense would have been admissible in separate trials of the other offenses. The

evidence that Welch had only a small amount of marijuana at his home along with the paraphernalia to smoke it, and his statement that he used marijuana on a daily basis, would have been admissible at a separate trial on the importation charge because it was relevant to show a motive to arrange for the shipment, that is, to replenish his supply. It would also have been admissible to refute his argument at trial that he was "merely present" at the house to which the package was addressed, had no role in arranging its delivery, and accordingly did not knowingly import the marijuana. The evidence that his wife had sent him the package confirmed to be marijuana also would have been relevant in a separate trial on the possession and drug paraphernalia charges to show absence of mistake, i.e., that, contrary to his arguments at trial, the untested substance in the grinder at his house was also marijuana, and the paraphernalia found in his home were used to smoke the drug. The evidence of the other acts, in short, was cross-admissible to show motive, knowledge, and absence of mistake -- all permissible purposes under the rules of evidence. *See* Ariz. R. Evid. 404(b) (evidence of other crimes may be admissible "as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident"); *State v. Stein*, 153 Ariz. 235, 239, 735 P.2d 845, 849 (App. 1987) (joinder of offenses relating to importation of heroin with

offenses of possession of marijuana and methamphetamine was proper based on defendant's denial of knowledge of methamphetamine, and claim that heroin was mailed to him from Nepal by mistake).[5]

B. Rule 13.3(a)(2)

¶10 The transportation for sale/importation and the possession charges were also properly joined under Rule 13.3(a)(2) because they were "otherwise connected together in their commission."

¶11 Offenses are considered otherwise connected together in their commission when "the offenses arose out of a series of connected acts, and the evidence as to each count, of necessity, overlaps; where most of the evidence admissible in proof of one offense is also admissible in proof of the other; or where there are common elements of proof in the joined offenses." *State v. Garland*, 191 Ariz. 213, 217, ¶ 14, 953 P.2d 1266, 1270 (App. 1998) (citation and internal punctuation omitted); *see also*

[5] These facts distinguish this case from the cases on which Welch relies. *See State v. Ramirez-Enriquez*, 153 Ariz. 431, 432, 737 P.2d 407, 408 (App. 1987) (holding that evidence of other occasions on which defendant had sold marijuana, and small amount of drug found in his home, was inadmissible propensity evidence in trial of defendant on charge of sale of marijuana, in light of absence of proof of common scheme or plan); *State v. Torres*, 162 Ariz. 70, 72-74, 781 P.2d 47, 49-51 (App. 1989) (holding that defendant's prior drug use was inadmissible propensity evidence in possession case, in light of his defense that he had not possessed any drugs, and the police had simply planted the evidence).

State v. Prion, 203 Ariz. 157, 162, ¶ 32, 52 P.3d 189, 194 (2002) (holding that this "language addresses whether evidence of the two crimes was so intertwined and related that much the same evidence was relevant to and would prove both, and the crimes themselves arose out of a series of connected acts").

¶12 Our supreme court has held joinder of offenses proper under Rule 13.3(a)(2), and refusal to sever not error, when the individual crimes committed on the same day were part of defendant's "continuing effort to obtain money and supplies,"[6] when defendant's own statements suggested he had attempted to silence a witness he believed had implicated him in the earlier murder,[7] and when the murder weapons came from a prior burglary.[8] Here, the offenses were connected in their commission by Welch's own statements, in which he admitted that he used marijuana on a daily basis, that police would find about an ounce in his home, and that his wife "obviously" had sent him the package of nearly three pounds of marijuana from California for personal use.

---

[6] *State v. Comer*, 165 Ariz. 413, 418-20, 799 P.2d 333, 338-40 (1990).

[7] *State v. Williams*, 183 Ariz. 368, 375-77, 904 P.2d 437, 444-46 (1995).

[8] *State v. Martinez-Villareal*, 145 Ariz. 441, 446, 702 P.2d 670, 675 (1985).

C. Rule 13.3(a)(3)

¶13 The offenses were also arguably properly joined pursuant to Rule 13.3(a)(3) because they were part of a "common scheme or plan."

¶14 Offenses are considered part of a "common scheme or plan" if they are "sufficiently related to be considered a single criminal offense," meaning they are joined by "a particular plan of which the charged crime is a part." *State v. Ives*, 187 Ariz. 102, 108, 927 P.2d 762, 768 (1996).

¶15 The offenses could be considered all part of a plan to import a substantial supply of marijuana, part of which Welch could use to replenish his personal supply that was near exhaustion, and the other part Welch could sell and use the proceeds to buy land in California to cultivate marijuana.

¶16 Finally, Welch has failed to show that he was deprived of a fair trial or prejudiced as a result of the joinder, which is necessary for reversal. *See Prince*, 204 Ariz. at 159, ¶ 13, 61 P.3d at 453 ("When a defendant challenges a denial of severance on appeal, he must demonstrate compelling prejudice against which the trial court was unable to protect.") (citation and internal punctuation omitted). A defendant is not prejudiced by the court's denial of severance "where the jury is instructed to consider each offense separately and advised that each must be proved beyond a reasonable doubt." *State v.*

Johnson, 212 Ariz. 425, 430, ¶ 13, 133 P.3d 735, 740 (2006) (quoting *Prince,* 204 Ariz. at 160, ¶ 17, 61 P.3d at 454). Such was the case here. We presume the jury followed these instructions. *See State v. LeBlanc,* 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996).

¶17 For the foregoing reasons, we find no reversible error in the judge's refusal to sever the transportation for sale/importation offense from the possession offenses.

II. SUFFICIENCY OF THE EVIDENCE

¶18 Welch also argues that the trial court abused its discretion in denying his motion for judgment of acquittal on the offenses of transportation for sale/importation of marijuana and possession of marijuana.

¶19 A directed verdict of acquittal is appropriate only "if there is no substantial evidence to warrant a conviction." Rule 20(a). "Substantial evidence is more than a mere scintilla and 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. Landrigan,* 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993) (citation and internal quotation marks omitted); *see also* Rule 20(a). In reviewing the sufficiency of evidence, we view the facts in the light most favorable to upholding the jury's verdict, and resolve all conflicts in the evidence against defendant. *State v. Girdler,*

138 Ariz. 482, 488, 675 P.2d 1301, 1307 (1983). The credibility of witnesses and the weight given to their testimony are issues for the jury, not the trial judge. *See State v. Just,* 138 Ariz. 534, 545, 675 P.2d 1353, 1364 (App. 1983). "To set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987).

¶20 Welch specifically argues on appeal with respect to the offense of transportation for sale/importation of marijuana only that the evidence failed to demonstrate beyond a reasonable doubt that he intended to sell the marijuana in the package shipped to his address. This argument has no merit. The jury found Welch guilty only of importation of marijuana, which has no "for sale" element. *See* A.R.S. § 13-3405(A)(4) (2010) ("A person shall not knowingly . . . import into this state . . . marijuana."); *State v. Chabolla-Hinojosa*, 192 Ariz. 360, 364, ¶ 16, 965 P.2d 94, 98 (App. 1998) (noting that "an importation charge has no 'for sale' element"). The State accordingly was not required to prove that Welch intended to sell the marijuana in order to convict him.

¶21 We similarly find no merit in Welch's argument that because the State did not submit the substance for scientific analysis, it did not offer sufficient evidence that the

substance in the grinder was marijuana. The officer testified from long experience in drug investigations that the substance he saw in the grinder was marijuana. The officer's expert testimony, along with Welch's admission to police that he used marijuana on a daily basis and that police would find about an ounce in his house, was sufficient to prove that the substance was marijuana. *See State v. Ampey,* 125 Ariz. 281, 282, 609 P.2d 96, 97 (App. 1980).

¶22 Finally, we reject Welch's argument that the evidence was insufficient because the State offered no evidence to prove that the resin had not been extracted from the marijuana. For this argument, Welch relies on A.R.S. § 13-3401(19),[9] which defines marijuana as "all parts of any plant of the genus cannabis" except mature stalks, sterilized seeds, and parts that have had the resin extracted.

¶23 An analogous issue arose in *State v. Rosthenhausler*, 147 Ariz. 486, 711 P.2d 625 (App. 1985), *cited with approval in State v. Valles*, 162 Ariz. 1, 7, 780 P.2d 1049, 1055 (1989). Rosthenhausler was convicted of aggravated assault using a firearm. *Rosthenhausler*, 147 Ariz. at 490-91, 711 P.2d at 629-

[9] "'Marijuana' means all parts of any plant of the genus cannabis, from which the resin has not been extracted, whether growing or not, and the seeds of such plant. Marijuana does not include the mature stalks of such plant or the sterilized seed of such plant which is incapable of germination." A.R.S. § 13-3401(19).

630. The statutory definition of a "firearm" excludes "a firearm in permanently inoperable condition." A.R.S. § 13-105(19). Whether the gun involved was inoperable was not raised until defense counsel's closing arguments. *Rosthenhausler*, 147 Ariz. at 491, 711 P.2d at 630. The issue raised on appeal was "whether the state should have been required to prove that the gun was not inoperable as an element of the aggravated assault charges." *Id.* at 490, 711 P.2d at 629. This court "[did] not believe that by 'excepting' from the definition of 'firearm' weapons which are in a permanently inoperable condition, the legislature intended that the state be required to prove the non-existence of the exception." *Id.* at 493, 711 P.2d at 632. The supreme court later summarized our holding as follows: "Absent reasonable doubt as to the operability of a firearm, the state has no burden to prove the gun was not permanently inoperable." *Valles,* 162 Ariz. at 7, 780 P.2d at 1055 (citing with approval *Rosthenhausler,* 147 Ariz. at 490-93, 711 P.2d at 629-32).

¶24 As in *Rosthenhausler*, we do not believe that by "excepting" cannabis plant parts from which the resin had been extracted from the definition of marijuana, the legislature intended that the state be required to prove that no such extraction had occurred. Therefore, absent reasonable doubt as to whether such extraction had occurred, the state had no burden

to prove that it had not.

¶25 Welch did not ask the trial court to define marijuana for the jury, or to instruct the jury that marijuana does not include cannabis parts from which the resin has been extracted. The uncontested evidence was that the substance was marijuana, Welch admitted it was marijuana, and Welch's admitted intended use for the substance made it unlikely that the resin had been extracted from it. Also, no evidence was presented to suggest that the resin might have been extracted. On this record, we do not find any reasonable doubt that the resin had not been extracted from the substance, and accordingly, the state had no burden to prove that fact.

CONCLUSION

¶26 For the foregoing reasons, we affirm Welch's convictions and sentences.

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
PHILIP HALL, Presiding Judge

/s/
_____
SHELDON H. WEISBERG, Judge