DIVISION ONE
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PHILIP G. URRY, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 09-0749
	)	
Appellee,	)	DEPARTMENT C
	)	
v.	)	**MEMORANDUM DECISION**
	)	Superior Court
TERRI LYNN SCHADE,	)	(Not for Publication -
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR 2009-120563-003 DT

The Honorable Cari A. Harrison, Judge

AFFIRMED

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

Michael J. Dew — Phoenix
Attorney for Appellant

D O W N I E, Judge

¶1 Terri Lynn Schade ("defendant") appeals her conviction for possession of equipment and/or chemicals to manufacture methamphetamine, a dangerous drug, in violation of Arizona

Revised Statutes ("A.R.S.") section 13-3407 (2010).[1] Pursuant to *Anders v. California,* 386 U.S. 738 (1967), and *State v. Leon,* 104 Ariz. 297, 451 P.2d 878 (1969), defense counsel has advised that he has thoroughly searched the record and found no arguable question of law and requests that we review the record for fundamental error. *See State v. Richardson*, 175 Ariz. 336, 339, 857 P.2d 388, 391 (App. 1993). Defendant was given the opportunity to file a supplemental brief *in propria persona*, but she has not done so. On appeal, we view the evidence in the light most favorable to sustaining the conviction. *State v. Tison,* 129 Ariz. 546, 552, 633 P.2d 355, 361 (1981), *cert. denied,* 459 U.S. 882 (1982).

FACTS AND PROCEDURAL HISTORY

¶2 On March 22, 2009, defendant, her boyfriend D.M., and W.B. drove to Safeway and Fry's, where D.M. and W.B. bought several boxes of pseudoephedrine pills (commonly known as Sudafed) to make methamphetamine. They returned to a room registered to W.B. at the Premier Inn, where D.M. and W.B. began producing methamphetamine.

¶3 On March 23, 2009, police received an anonymous tip that W.B. was staying at the hotel and went to arrest him for a probation violation in an unrelated case. When they arrived,

[1] We cite to the current version of statutes when no revisions material to this decision have occurred.

W.B. and D.M. were in the room. Defendant was in D.M.'s Suburban, which was parked across from the hotel room.

¶4 Upon entering the room, police noticed a haze and a strong chemical odor that smelled like iodine. Scattered around the room and on the floor were empty boxes of pseudoephedrine pills and enough chemicals, materials, and equipment for at least one methamphetamine lab. A second complete methamphetamine lab was found in a wooden box in the bathroom. Because the lid of the box was partially open, its contents were clearly visible. Several containers of liquids and a strainer were found outside the box.

¶5 Police seized methamphetamine in various stages of production, including pseudoephedrine pills in the extraction phase and methamphetamine in the bi-phase liquid stage. On the edge of the bathtub, next to a woman's bracelet, was a plate of white chunks of methamphetamine crystals that had not yet been through the final washing stage with acetone. A bottle containing acetone was found nearby.

¶6 In the Suburban, police found a can of red phosphorous, which is used with iodine for manufacturing methamphetamine. In a utility trailer by the Suburban, police found coffee filters with methamphetamine residue and paper towels with iodine stains.

¶7 Detective T.M. read *Miranda* rights to defendant before interviewing her. Defendant told the detective that she arrived at the hotel with D.M. and W.B. around 7:00 p.m. the previous day. She admitted going with them to the stores and giving D.M. money to buy pseudoephedrine pills. She knew that Sudafed, red phosphorous, iodine, alcohol, and hydrogen peroxide were used to make methamphetamine and said that she "probably" saw those materials in the room. She stated D.M. made methamphetamine before and that she was in the room because "[u]ltimately, she was going to get some methamphetamine out of it." She admitted having used methamphetamine during her stay at the hotel.

¶8 Defendant was charged as follows: Count 1--illegally conducting an enterprise (racketeering to manufacture and possess methamphetamine or chemicals and equipment for its production), a class 3 felony; Count 2--manufacture of methamphetamine, a class 2 felony; Count 3--possession of methamphetamine for sale in an amount over the statutory threshold, a class 2 felony; Count 4--possession of drug paraphernalia, a class 6 felony; and Count 5--possession of chemicals and equipment to manufacture methamphetamine, a class 2 felony. After Count 4 was dismissed on the State's motion, a jury trial ensued on Counts 1, 2, 3, and 5. The State alleged additional aggravators and that defendant was a repetitive offender based on non-historical priors.

¶9 At the conclusion of the State's case, defendant moved for a judgment of acquittal pursuant to Arizona Rule of Criminal Procedure ("Rule") 20. The court granted the motion as to Count 3 because the State failed to prove the statutory threshold amount of methamphetamine. As to Count 1, the court took the matter under advisement to allow the State to brief why it should not also be dismissed for that reason. Count 5 was dismissed and made a lesser-included offense of Count 2.

¶10 Defendant's boyfriend testified that defendant was asleep the entire time he was in the bathroom making methamphetamine. He stated that defendant could not have seen any of the equipment because he had packed it back into the wooden box before she awoke, and the room was "[n]eat and tidy" when she was in it. He claimed he only took the equipment out again so he could wash it while defendant was out to do laundry the next morning.

¶11 The court submitted Counts 1 and 2 (as amended) to the jury. The jury could not reach a verdict on Count 1, and it was dismissed. As for Count 2, the jury found defendant guilty of the lesser-included offense of possession of chemicals and equipment to manufacture methamphetamine. Defendant was sentenced to a mitigated prison term of five years; she received 114 days of pre-sentence incarceration credit.

DISCUSSION

¶12 We have read and considered the briefs submitted by defense counsel and reviewed the entire record. We find no fundamental error.[2] All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure, and the sentence imposed was within the statutory range. There were no irregularities in the deliberation process.

¶13 The trial court properly denied defendant's Rule 20 motion. A judgment of acquittal is appropriate only when there is "no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20. Substantial evidence is such proof that "reasonable persons could accept as adequate and sufficient to

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[2] The prosecutor stated, "I think," or "I don't think," several times during closing argument when discussing the evidence. Because defense counsel did not object, we review only for fundamental error. *State v. Cannon*, 148 Ariz. 72, 79, 713 P.2d 273, 280 (1985) (citation omitted). "In order to constitute fundamental error, the prosecutor's comment[s] had to be so egregious as to deprive the defendant of a fair trial, and to render the resulting conviction a denial of due process." *State v. Zinsmeyer,* 222 Ariz. 612, 620, ¶ 16, 218 P.3d 1069, 1077 (App. 2009) (citations omitted). Although the prosecutor's personal beliefs are irrelevant, the statements did not rise to the level of impermissible vouching. The prosecution did not place the prestige of the government behind its witnesses or suggest that evidence not before the jury supported a guilty verdict. *See State v. Palmer,* 219 Ariz. 451, 453, ¶ 6, 199 P.3d 706, 708 (App. 2008) (citation omitted). Because "[w]ide latitude . . . is given in closing arguments," *State v. Dumaine*, 162 Ariz. 392, 401, 783 P.2d 1184, 1193 (1989), and the jury was instructed that closing arguments do not constitute evidence, we find no fundamental error. *See State v. Newell*, 212 Ariz. 389, 403, ¶ 69, 132 P.3d 833, 847 (2006) ("[W]e presume jurors follow the court's instructions.") (citation omitted).

support a conclusion of defendant's guilt beyond a reasonable doubt." *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990) (citations omitted). "Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction." *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996).

¶14 The State presented substantial evidence of guilt, including statements defendant made to Detective T.M., as well as testimony from police investigators and photographs showing that the chemicals and equipment were in plain view in the room and bathroom.[3] Although defendant's boyfriend testified that defendant did not see the chemicals and equipment, "it is the trier of fact's role, and not this court's, to 'resolve conflicting testimony and to weigh the credibility of witnesses.'" *State v. Lee,* 217 Ariz. 514, 516, ¶ 10, 176 P.3d 712, 714 (App. 2008) (citation omitted).

[3] The State was required to prove actual or constructive possession. Ariz. Rev. Stat. §§ 13-105(33) (2010), -3407. Defendant was in constructive possession because she knowingly exercised control over the room and bathroom, where the chemicals and equipment were found in plain view. *See State v. Teagle,* 217 Ariz. 17, 27, ¶ 41, 170 P.3d 266, 276 (App. 2007) ("Constructive possession can be established by showing that the accused exercised dominion and control over . . . the location in which the [chemicals and equipment were] found.") (citation omitted); *State v. Carroll,* 111 Ariz. 216, 218, 526 P.2d 1238, 1240 (1974) ("Exclusive, immediate and personal possession [of drugs] is not necessary to establish constructive possession . . . .") (citation omitted).

CONCLUSION

¶15 We affirm defendant's conviction and sentence. Counsel's obligations pertaining to defendant's representation in this appeal have ended. Counsel need do nothing more than inform defendant of the status of the appeal and her future options, unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154,156-57 (1984). On the court's own motion, defendant shall have thirty days from the date of this decision to proceed, if she so desires, with an *in propria persona* motion for reconsideration or petition for review.

/s/
MARGARET H. DOWNIE, Presiding Judge

CONCURRING:

/s/
DONN KESSLER, Judge

/s/
PETER B. SWANN, Judge