DIVISION ONE
FILED: 05/15/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 11-0033
	)	
Appellee,	)	DEPARTMENT E
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
ROBERT JAMES WHIGAM,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-144771-001 DT

The Honorable Roger E. Brodman, Judge

CONVICTION AFFIRMED; REMANDED REGARDING SENTENCING

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G E M M I L L, Judge

¶1 Robert Whigam appeals from his conviction and sentence for one count of possession of drug paraphernalia, a class 6 felony. For the following reasons, we affirm Whigam's conviction and remand for a determination of prejudice concerning Whigam's sentence.

FACTS AND PROCEDURAL HISTORY

¶2 Whigam was charged with two offenses: possession or use of dangerous drugs (a class 4 felony); and possession of drug paraphernalia (a class 6 felony). The jury found Whigam not guilty of count one, possession or use of dangerous drugs, and guilty of count two, possession of paraphernalia.

¶3 We must view the facts and all reasonable inferences in a position most favorable to upholding the jury's verdict. *See State v. Vandever*, 211 Ariz. 206, 207, n.2, ¶ 1, 119 P.3d 473, 474 n.2 (App. 2005). With this in mind, the following facts were revealed at trial.

¶4 On July 7, 2009, officers on routine patrol noticed a vehicle with an out-of-state license plate. The officers performed a standard check of the license number and determined that the license plates were suspended. The officers conducted a traffic stop and found that Whigam was driving the vehicle and that the vehicle was not registered to him.

¶5 Officer Mark S. testified that Whigam was acting very

nervous during the traffic stop, including shaky hands, unusual sweating, and slurred speech. The officer asked Whigam to step out of the vehicle and the officer performed a pat-down search of Whigam's person. The officer sat Whigam down on the curb but noticed that Whigam was still acting nervous, almost to the point of looking to flee from the scene.

¶6 The officer called for a K-9 unit to have the police dog perform a free air sniff of the outside of the vehicle. When the K-9 unit arrived, Whigam consented to the K-9's search of the vehicle's interior. The dog entered the car, and the dog alerted to an area of the car under the driver's seat. The officers retrieved an Altoids tin with three separate bags or baggies containing a clear crystal-like substance believed to be methamphetamine along with two empty baggies. The officer arrested Whigam and performed a more thorough search of his person. During the search, the officer located a plastic baggie which was identical to the baggies found inside the Altoids tin. According to the officer, the baggie found in Whigam's pocket contained a white resin.

¶7 A controlled substance criminalist tested the three baggies found in the vehicle containing the white crystal-like substance and found that all three contained methamphetamine. The criminalist did not test the baggie that came from Whigam's pocket. At the conclusion of the State's case, Whigam made a

Rule 20(a) motion for judgment of acquittal for lack of evidence, which the trial court denied.

¶8 Tashira M. testified on Whigam's behalf. She averred that she never met Whigam but had seen him a couple of times in passing, and only found out who he was on the eve of trial. She testified that the Altoids tin, the baggies, and the methamphetamine were hers. She stated that she borrowed the car that Whigam was driving at the time of his arrest a few days prior to his arrest. The vehicle was Whigam's daughter's car. She further stated that she forgot her Altoids tin filled with seven grams of methamphetamine and empty baggies under the vehicle's seat because she was high on methamphetamine which made her "paranoid" and "distraught."

¶9 Tashira M. testified that when she picked up the seven grams of methamphetamine, she took one baggie and had a "courtesy smoke." She stated that she put the baggie down in the car but could not recall taking the courtesy smoke baggie with her when she exited the vehicle. During cross-examination, Tashira M. testified that she emptied the baggie containing the courtesy smoke (by smoking it) which left a visible amount of residue remaining in the baggie. Following Tashira M.'s testimony, the defense rested. The jury found Whigam guilty of possession of drug paraphernalia but not guilty of possession or use of dangerous drugs.

¶10 Whigam timely appeals, and we have jurisdiction in this matter pursuant to Arizona Constitution Article 6, Section 9, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033(A) (2010).[1]

ANALYSIS

There Was Sufficient Evidence Supporting Whigam's Possession of Drug Paraphernalia Conviction

¶11 Whigam contends that there was insufficient evidence in the record to convict him of possession of drug paraphernalia. Whigam argues that the State was unable to prove each and every element of its case in accordance with A.R.S. § 13-3415 (2010). Section 13-3415(A) provides in part: "It is unlawful for any person to use, or possess with intent to use, drug paraphernalia to . . . pack, repack, store, contain, [or] conceal . . . a drug." Whigam claims that the state offered no evidence that Whigam used or possessed with the intent to use the empty plastic baggie for the purposes found within A.R.S. § 13-3415(A).

¶12 Section 13-3415(E) provides a list of fourteen factors that the court should consider – along with "all other logically relevant factors" – when determining whether an object is drug paraphernalia. The pertinent factors most applicable here

[1] We cite to the current versions of the statutes when no revisions material to this decision have occurred since the date of the alleged offense.

include: the "proximity of the object, in time and space, to a direct violation of this chapter"; the "proximity of the object to drugs"; and the "existence of any residue of drugs on the object." A.R.S. § 13-3415(E)(3)-(5).

¶13 With this statutory scheme in mind, we review *de novo* a claim of error in the denial of a judgment of acquittal, and we view all evidence in a light most favorable to keeping the jury's verdict intact. *See State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993). "We review the sufficiency of evidence presented at trial only to determine if substantial evidence exists to support the jury verdict." *State v. Stroud*, 209 Ariz. 410, 411, ¶ 6, 103 P.3d 912, 913 (2005). Substantial evidence is evidence that "reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt." *State v. Hughes*, 189 Ariz. 62, 73, 938 P.2d 457, 469 (1997). "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Cox*, 217 Ariz. 353, 357, ¶ 22, 174 P.3d 265, 269 (2007) (internal citation omitted).

¶14 The State counters that there was sufficient evidence for a reasonable jury to find Whigam guilty of possession of drug paraphernalia. We agree.

¶15 Considering the applicable factors provided in A.R.S. § 13-3415(E), we conclude there was sufficient evidence in the record for reasonable jurors to find that the baggies were drug paraphernalia. Whigam was driving the vehicle while the baggie found in his pocket was in close proximity to the methamphetamine under the driver's seat. *See* A.R.S. § 13-3415(E)(3), (4). Possession or use of methamphetamine violates A.R.S. § 13-3407(A)(1) (2010) — no person shall knowingly use or possess a dangerous drug. *See* A.R.S. § 3415(E)(3). Someone affiliated with the car Whigam was driving was violating the possession statute, A.R.S. § 13-3407(A)(1), during Whigam's use of the vehicle. Whigam's baggie had a white resin in it that appeared consistent with the other baggies found within the Altoids tin containing methamphetamine. *See* A.R.S. § 13-3415(E)(5). Another "logically relevant factor" indicating drug paraphernalia is that Whigam's baggie itself was identical or very similar to the baggies found under the seat in the Altoids tin. *See* A.R.S. § 13-3415(E).

¶16 The jury could also take into account the police officer's observations of Whigam's demeanor. Specifically, the officer testified that Whigam was abnormally stressed by the traffic stop and subsequent search of the vehicle. The jury was entitled to draw reasonable inferences from the evidence. And the jury was instructed regarding direct and circumstantial

evidence, including: "[e]vidence may be direct or circumstantial" and "[c]ircumstantial evidence is the proof of a fact or facts from which you may find another fact." *See, e.g., State v. Orendain*, 188 Ariz. 54, 56, 932 P.2d 1325, 1327 (1997) (stating the jury may rely on inferences based on circumstantial evidence as long as the State proves each element of offense beyond a reasonable doubt); *State v. Teagle*, 217 Ariz. 17, 28, ¶ 44, 170 P.3d 266, 277 (App. 2007) ("A jury may properly infer that a driver and sole occupant of a vehicle containing a large amount of drugs was aware that the drugs were in the vehicle."); *see also State v. Stuard*, 176 Ariz. 589, 603, 863 P.2d 881, 895 (1993) ("Arizona law makes no distinction between circumstantial and direct evidence.").

¶17 We recognize that Tashira M. testified that all the methamphetamine and all of the baggies found inside the car belonged to her, not to Whigam. The jury was appropriately instructed regarding their duty to consider the credibility of witnesses. The jury was told that it could decide what testimony to "accept and what to reject." The jury was also instructed that law enforcement testimony was not to be given any greater weight because the person was wearing a badge. The jury was empowered with the ability to believe what the officers' said while on the stand, what Tashira M. attested to, portions of each person's testimony, or none of the testimony.

See State v. Soto-Fong, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (confirming that witness credibility is a task for the jury).

¶18 Applying these factors to the elements of A.R.S. § 13-3415(A), we determine a reasonable jury could infer that Whigam used or intended to use paraphernalia (the baggies) to: "contain", "store", or "pack" (the resin).

¶19 We additionally note that, in the Direct Complaint, Whigam was charged with unlawful possession with the intent to "use **baggies**, drug paraphernalia, to pack, repack, store, contain, or conceal methamphetamine." (Emphasis added). In their briefs, both Whigam and the State focus their arguments on the single baggie found within Whigam's pocket. Presumably this is because the jury found Whigam not guilty of possession or use of dangerous drugs, and it appears that the jury may have believed the testimony of Tashira M. On this record, however, we believe there was sufficient evidence for reasonable jurors to conclude that Whigam was in possession of the multiple baggies within the Altoids tin. Even though Whigam was found not guilty of possession or use of dangerous drugs, the jury could nonetheless have reached the seemingly inconsistent verdict of guilty of possession or use of drug paraphernalia, in regard to the baggies in the Altoids tin.

¶20 Juries are not required to render perfectly consistent

verdicts. *See Gusler v. Wilkinson ex rel. Maricopa Cnty.*, 199 Ariz. 391, 396, ¶ 25, 18 P.3d 702, 707 (2001) (permitting inconsistent jury verdicts on counts in the same indictment). Jury verdicts are sometimes inconsistent because the jury contemplates leniency or seeks compromise during deliberations. *See State v. Zakhar*, 105 Ariz. 31, 32-33, 459 P.2d 83, 84-85 (1969) (concluding that juries in the jury room make compromises or provide leniency when forming verdicts); *Lemke v. Rayes*, 213 Ariz. 232, 241, ¶ 26, 141 P.3d 407, 416 (App. 2006) (same).

¶21 Although our review of the evidence reveals sufficient evidence to uphold the jury verdict regarding paraphernalia with respect to either the baggies in the Altoids tin or the single baggie in Whigam's pocket, we have focused primarily on the evidence pertinent to that single baggie because the parties in their briefs address only the single baggie found on Whigam's person.

¶22 For these reasons, we reject Whigam's argument that the evidence was insufficient to support his conviction.

The Trial Court Erred By Not Providing
A Complete Rule 17.6 Colloquy to Whigam

¶23 Whigam asks us to remand for resentencing because the trial court provided an incomplete colloquy pursuant to Arizona Rules of Criminal Procedure 17.6 ("Rule"). Specifically, Whigam argues that the trial court did not advise him of the

constitutional rights he was forgoing by stipulating to his prior convictions. Rule 17.6 states: "Whenever a prior conviction is charged, an admission thereto by the defendant shall be accepted only under the procedures of this rule, unless admitted by the defendant while testifying on the stand." The procedures the court must follow are found in Rule 17.2, which tasks the trial court, *inter alia*, with making sure the defendant understands the constitutional rights he may be forgoing by stipulating to prior offenses.

¶24 Whigam did not object to the incomplete colloquy at trial. Therefore we are limited to fundamental error review on appeal. *See State v. Morales*, 215 Ariz. 59, 61, ¶ 10, 157 P.3d 479, 481 (2007) (citing *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005)). Under fundamental error review, Whigam must prove error, the error was fundamental (the error goes to the heart of the case precluding a fair trial), and the error caused him prejudice. *See Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607. In order to establish prejudice, Whigam must prove that he "would not have admitted the fact of the prior convictions had the colloquy been given." *Morales*, 215 Ariz. at 62, ¶ 11, 157 P.3d at 482.

> [R]emand for a determination of prejudice is the appropriate remedy when the defendant's prior convictions are not entered into evidence because "evidence of the necessary prejudice, i.e., that the defendant would

> not have stipulated to the prior conviction had the proper colloquy taken place, by nature is not usually to be found in the record on appeal."

State v. Osborn, 220 Ariz. 174, 178, ¶ 10, 204 P.3d 432, 436 (App. 2009) (quoting *State v. Carter*, 216 Ariz. 286, 291, ¶ 23, 165 P.3d 687, 692 (App. 2007)). However, remand is not necessary if evidence proving Whigam's prior convictions was entered into the record. *See id.*; *Morales*, 215 Ariz. at 62, ¶ 13, 157 P.3d at 482.

¶25 The State concedes that the trial court's colloquy was incomplete and that remand is required to determine prejudice. We agree. Conclusive proof of Whigam's prior convictions was not entered into evidence. Accordingly, and in accordance with *Morales*, *Henderson*, *Osborn* and *Carter*, remand to the trial court is appropriate to determine whether Whigam suffered prejudice from the incomplete colloquy.

CONCLUSION

¶26 For the foregoing reasons, we affirm Whigam's conviction, and we remand to determine if Whigam was prejudiced by the incomplete colloquy. If Whigam demonstrates he was prejudiced by the stipulation and incomplete colloquy, the trial court must allow Whigam the option of withdrawing the stipulation to the prior convictions. The State will then be allowed the opportunity to prove the prior convictions. The

trial court should then resentence Whigam accordingly.

_____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

_____/s/_____
PATRICIA A. OROZCO, Presiding Judge

_____/s/_____
PHILIP HALL, Judge