IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

RYAN ALEXANDER ROMERO-FIMBRES,
Appellant.

No. 2 CA-CR 2014-0042
Filed December 22, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20100357002
The Honorable Terry Chandler, Judge
The Honorable Brenden J. Griffin, Judge

AFFIRMED

COUNSEL

Thomas C. Horne, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By David A. Sullivan, Assistant Attorney General, Tucson
Counsel for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Scott A. Martin, Assistant Legal Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Kelly authored the decision of the Court, in which Judge Howard and Judge Vásquez concurred.

K E L L Y, Presiding Judge:

¶1 Following a jury trial, Ryan Romero-Fimbres was convicted of first-degree burglary, attempted aggravated robbery, and attempted armed robbery. The trial court sentenced him to concurrent, minimum terms of imprisonment, the longest of which was seven years. Two appeals to this court followed, one by Romero-Fimbres, after which the trial court granted his renewed motion for judgment of acquittal, and one by the state, which resulted in the reinstatement of the original convictions and sentences. In this appeal, Romero-Fimbres argues the evidence was insufficient to support his convictions and the court erred by denying his motion for a new trial. For the following reasons, we affirm Romero-Fimbres's convictions and sentences.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the verdicts. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In January 2010, T.G. was shot after three men broke into his home. Romero-Fimbres was charged as described above.[1] After the state rested its case, Romero-Fimbres moved for a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., which the trial court denied. After the jury returned its verdicts, Romero-Fimbres renewed his motion for a judgment of acquittal pursuant to Rule 20(b) and moved alternatively for a new trial pursuant to Rule 24.1. The court denied both motions. It then sentenced Romero-Fimbres as described above.

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[1]He also was charged with aggravated assault and attempted second-degree murder but was acquitted of those charges.

¶3 Romero-Fimbres appealed his convictions and sentences to this court, and we stayed the appeal and revested jurisdiction in the trial court "for the limited purpose of addressing the Rule 20(b) motion under the standard set forth" in *State v. West*, 226 Ariz. 559, 250 P.3d 1188 (2011). Following a hearing, the trial court determined there was not substantial evidence to warrant Romero-Fimbres's conviction, and granted the renewed motion for judgment of acquittal. Romero-Fimbres's appeal was dismissed as moot.

¶4 The state then appealed the court's grant of judgment of acquittal. We reversed the trial court's Rule 20(b) ruling and ordered it to reinstate the convictions and sentences previously imposed. *State v. Romero-Fimbres*, No. 2 CA-CR 2012-0178 (memorandum decision filed Feb. 25, 2013). After the original convictions and sentences were reinstated, Romero-Fimbres initiated this appeal which, as he points out, "is in essence [his] first appeal from the judgments and sentences resulting from this prosecution."

Sufficiency of the Evidence

¶5 Romero-Fimbres argues the evidence was insufficient to support his convictions, thus violating his Fourteenth Amendment right to due process of law. In his opening brief, he states that he "acknowledges that this Court resolved the sufficiency of the evidence issue against [him] in the context of the State's appeal," and, because that decision was "based on the same appellate record and de novo review applicable to this claim in [his] appeal, it is presumably controlling as law of the case." Notwithstanding this concession, he contends in his reply brief, in response to the state's argument that the law of the case doctrine bars his argument, that "the issues that were raised in the State's appeal . . . are not the same as the issues raised here." Specifically, he asserts that we did not address his "due-process-based sufficiency of the evidence argument in the State's appeal."

¶6 "'Law of the case concerns the practice of refusing to reopen questions previously decided in the same case by the same court or a higher appellate court.'" *State v. Whelan*, 208 Ariz. 168, ¶ 8, 91 P.3d 1011, 1014 (App. 2004), *quoting Davis v. Davis*, 195 Ariz.

158, ¶ 13, 985 P.2d 643, 647 (App. 1999) (emphasis omitted). "[N]o question necessarily involved and decided on that appeal will be considered on a second appeal . . . in the same case, provided the facts and issues are substantially the same as those on which the first decision rested." *State v. King*, 180 Ariz. 268, 278, 883 P.2d 1024, 1034 (1994), *quoting In re Monaghan's Estate*, 71 Ariz. 334, 336, 227 P.2d 227, 228 (1951). The doctrine does not apply "if the prior decision did not actually decide the issue in question, if the prior decision is ambiguous, or if the prior decision does not address the merits." *Powell-Cerkoney v. TCR-Montana Ranch Joint Venture, II*, 176 Ariz. 275, 279, 860 P.2d 1328, 1332 (App. 1993). In addition, "reliance upon law of the case does not justify a court's refusal to reconsider a ruling when an error in the first decision renders it manifestly erroneous or unjust or when a substantial change occurs in essential facts or issues, in evidence, or in the applicable law." *Id.*

¶7 Here, Romero-Fimbres does not assert that there has been a substantial change in the evidence or the law. The facts at issue in this appeal are the same facts that formed the basis of our ruling that there was substantial evidence to support Romero-Fimbres's conviction, and he does not argue otherwise. Instead, Romero-Fimbres contends he did not "rais[e] a claim of constitutional insufficiency of the pre-remand trial evidence" in his first appeal and that issue "is not the same as that resolved against him in the State's appeal."

¶8 Under Rule 20, "the court shall enter a judgment of acquittal . . . if there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(a). In a motion for a judgment of acquittal, "the 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." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis omitted).

¶9 In *State v. Tison*, our supreme court, citing *Jackson*, stated that "due process requires a court to utilize as the standard of review whether there was sufficient evidence that a rational trier of fact could have found guilt beyond a reasonable doubt." 129 Ariz. 546, 552, 633 P.2d 355, 361 (1981). The court stated, "[i]n Arizona,

the substantial evidence test applied to reviews on appeal is consistent with the constitutional principles enunciated in" *Jackson*. *Id.* at 553, 633 P.2d at 362. It based that conclusion on "the manner in which [it has] defined the term 'substantial evidence,'" that is, "'more than a scintilla'" and "'such proof as a reasonable mind would employ to support the conclusion reached.'" *Id.*, *quoting State v. Bearden*, 99 Ariz. 1, 4, 405 P.2d 885, 886 (1965). "'If reasonable men may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial.'" *Id.*, *quoting Bearden*, 99 Ariz. at 4, 405 P.2d at 886 (alteration in *Tison*). The court stated that "[t]his approach equates with the mandate in *Jackson* requiring the reviewing court to find that a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt." *Id.*

¶10 We conclude that the "substantial evidence" standard we applied to evaluate the Rule 20(b) motion is the same standard that would be used to evaluate a due process challenge to the sufficiency of the evidence. We therefore apply the law of the case doctrine and conclude that Romero-Fimbres's due process challenge is barred.

Denial of Motion for New Trial

¶11 Romero-Fimbres argues the trial court abused its discretion by denying his motion for a new trial. The state points out that Romero-Fimbres did not move orally for a new trial after the jury rendered its verdicts, and he did not file his Rule 24.1 motion for a new trial until fourteen days after the verdicts. Thus, the state argues, the Rule 24.1 motion was untimely, and the trial court did not have jurisdiction to consider it.

¶12 Rule 24.1(b) requires a motion for a new trial to be filed no later than ten days after the verdict. The jury rendered its verdicts on December 3, 2010, and Romero-Fimbres filed his motion for new trial on December 17, 2010. Romero-Fimbres concedes his Rule 24.1 motion was untimely.

¶13 A trial court has no jurisdiction to entertain an untimely motion for a new trial. *See State v. McCrimmon*, 187 Ariz. 169, 172,

927 P.2d 1298, 1301 (1996); *see also State v. Hill*, 85 Ariz. 49, 53-54, 330 P.2d 1088, 1090 (court had no jurisdiction over untimely motion filed pursuant to predecessor to Rule 24.1(b)). "Because appellate jurisdiction is derivative, when jurisdiction is lacking in the trial court, it is lacking on appeal." *Webb v. Charles*, 125 Ariz. 558, 560, 611 P.2d 562, 565 (App. 1980). Although Romero-Fimbres urges us to invoke the "inherent powers of the court" to disregard the late filing of his Rule 24.1(b) motion, "[m]otions filed after the 10-day limit have no effect," *State v. Wagstaff*, 161 Ariz. 66, 70, 775 P.2d 1130, 1134 (App. 1988), and we may not address an issue or provide relief if we lack jurisdiction, *State v. Bejarano*, 219 Ariz. 518, ¶ 2, 200 P.3d 1015, 1016 (App. 2008). Therefore, we conclude that we lack jurisdiction to consider the court's denial of Romero-Fimbres's motion for a new trial.

Disposition

¶14 For the foregoing reasons, we affirm Romero-Fimbres's convictions and sentences.