IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ABRAM PAUL OCHOA,
Appellant.

No. 2 CA-CR 2015-0190
Filed April 20, 2016

Appeal from the Superior Court in Pinal County
No. S1100CR201302288
The Honorable Joseph R. Georgini, Judge

AFFIRMED AS MODIFIED

COUNSEL

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MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Miller concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Following a jury trial, Abram Ochoa was convicted of five drug-related offenses. The trial court sentenced him to concurrent, presumptive prison terms, the longest of which is 15.75 years. On appeal, Ochoa contends the court erred by denying his motion for a judgment of acquittal based on corpus delicti. He also argues the court erred by imposing flat-time sentences for each offense. For the reasons that follow, we affirm Ochoa's convictions and affirm his sentences as modified.

Factual and Procedural Background

¶2 We view the facts and all reasonable inferences therefrom in the light most favorable to upholding Ochoa's convictions. *See State v. Allen*, 235 Ariz. 72, ¶ 2, 326 P.3d 339, 341 (App. 2014). In October 2013, Casa Grande Police Officer Bryan Martinez was patrolling the west side of the city in his marked cruiser when he observed Ochoa washing a car in a residential driveway. Based on the neighborhood and how the car was parked, Martinez believed Ochoa was indicating that he was "[o]pen for drug sales." When Ochoa saw Martinez, he stopped washing the car and walked to the front door, but he returned to the car after Martinez drove past the house. At the end of the street, Martinez turned around and drove back the way he came. When Ochoa saw Martinez again, he "rushed" to the front door and went inside. After Martinez had passed, Ochoa finished washing the car. Ochoa then got in the car and left. Martinez, who had parked off to the side and had continued watching the house, followed Ochoa. When Ochoa looked over at Martinez, Martinez noticed that Ochoa's "eyes got really big."

¶3 After Ochoa made an illegal right turn, Martinez initiated a traffic stop. Martinez conducted a records check, which revealed Ochoa had a suspended driver's license and an outstanding warrant for his arrest. Martinez arrested Ochoa, who had $186 cash in his possession. During an inventory search of the car before it was impounded, Martinez and another officer found five baggies of methamphetamine and a package of marijuana in the cup holder of the center console. They also found a glass pipe and rolling papers. At the police station, Ochoa agreed to talk to the officers and admitted that one of the baggies of methamphetamine was for his own personal use and that he intended to sell the other four. He also stated that the marijuana was for his own personal use, as were the pipe and rolling papers.

¶4 A grand jury indicted Ochoa for possession of methamphetamine for sale, possession of methamphetamine, possession of marijuana, and two counts of possession of drug paraphernalia. He was convicted as charged, and the trial court sentenced him as described above. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Corpus Delicti

¶5 Ochoa contends the trial court erred by denying his motion for a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., based on the doctrine of corpus delicti. Although Ochoa moved for a judgment of acquittal at trial, he did not make the corpus delicti argument he now raises on appeal. Therefore, he has forfeited review for all but fundamental, prejudicial error. *See State v. Rhome*, 235 Ariz. 459, ¶ 4, 333 P.3d 786, 787 (App. 2014); *see also State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). However, a conviction based on insufficient evidence constitutes such error. *Rhome*, 235 Ariz. 459, ¶ 4, 333 P.3d at 787.

¶6 Under Rule 20(a), a trial court "shall enter a judgment of acquittal . . . if there is no substantial evidence to warrant a conviction." "'Substantial evidence is proof that reasonable persons could accept as sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt.'" *State v. Rivera*, 226 Ariz. 325, ¶ 3,

247 P.3d 560, 562 (App. 2011), *quoting State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996). Substantial evidence may be direct or circumstantial. *State v. Pena*, 209 Ariz. 503, ¶ 7, 104 P.3d 873, 875 (App. 2005).

¶7 "The rule of corpus delicti is that '[a]n accused may not be convicted on his own uncorroborated confessions.'" *State v. Jones ex rel. Cty. of Maricopa*, 198 Ariz. 18, ¶ 10, 6 P.3d 323, 326 (App. 2000), *quoting State v. Gillies*, 135 Ariz. 500, 506, 662 P.2d 1007, 1013 (1983) (alteration in *Jones*). Before a confession is admissible, "the state must establish the corpus delicti by showing proof of a crime and that someone is responsible for that crime." *Id.* ¶ 12. "[O]nly a reasonable inference of the corpus delicti need exist before a confession may be considered." *State v. Gerlaugh*, 134 Ariz. 164, 170, 654 P.2d 800, 806 (1982). And "[c]orpus delicti can be established through circumstantial evidence." *State v. Chappell*, 225 Ariz. 229, ¶ 9, 236 P.3d 1176, 1181 (2010).

¶8 Ochoa specifically challenges his conviction for possession of dangerous drugs for sale.[1] Pursuant to A.R.S. § 13-3407(A)(2), "[a] person shall not knowingly . . . [p]ossess a dangerous drug for sale." "Dangerous drug" is defined in A.R.S. § 13-3401(6) and includes methamphetamine.

¶9 Although Ochoa confessed to police that some of the methamphetamine was "for sale," he maintains the state failed to introduce independent evidence to corroborate his confession. He points out the officers did not observe him selling drugs and they found no drug ledger, scales, or weapons typically associated with the sale of drugs. In support of his argument, Ochoa relies on *State v. Cobelli*, 788 P.2d 1081 (Wash. Ct. App. 1989).

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[1]Although Ochoa requests that we vacate his "convictions . . . in their entirety," he offers no meaningful argument challenging the sufficiency of the evidence for his other four convictions. We therefore deem any such argument waived. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (opening brief must contain argument); *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) (failure to argue constitutes waiver).

¶10 *Cobelli* is distinguishable. There, the Washington Court of Appeals determined the trial court had erred in admitting the defendant's confession during his trial for possession of marijuana with intent to deliver. *Id.* at 1083. The court explained that the state had failed to establish the corpus delicti of "an intent to deliver" because there was no evidence of an exchange of drugs or money or evidence that the amount of drugs the defendant possessed was typically associated with an intent to deliver. *Id.*

¶11 Here, however, possession of dangerous drugs for sale does not require proof of an intent to deliver. *See* § 13-3407(A)(2). To meet its burden under the corpus delicti rule, the state had to show that Ochoa's possession of the methamphetamine was "for the purpose of sale." *State v. Arce*, 107 Ariz. 156, 160, 483 P.2d 1395, 1399 (1971). But a reasonable inference was sufficient. *See Gerlaugh*, 134 Ariz. at 170, 654 P.2d at 806; *State v. Morgan*, 204 Ariz. 166, ¶ 15, 61 P.3d 460, 464 (App. 2002).

¶12 The state presented independent, circumstantial evidence corroborating Ochoa's statement that he planned to sell some of the methamphetamine. Martinez testified that, when he first saw Ochoa, he thought Ochoa was signaling he was "[o]pen for drug sales," based on "that particular neighborhood" and how the car was "backed in [the] driveway." Inside the cup holder of the car, the officers found five prepackaged baggies of methamphetamine in varying amounts. Martinez also testified that, based on his training and experience, the baggies of methamphetamine were possessed for sale. The trial court therefore did not err—let alone fundamentally err—by denying Ochoa's motion for a judgment of acquittal based on corpus delicti.[2] *Cf. State v. Jung*, 19 Ariz. App. 257, 261-62, 506 P.2d 648, 652-53 (1973) (evidence supported conviction of possession of narcotics for sale "notwithstanding absence of evidence of any sale or transaction by defendant").

[2]Because independent, corroborating evidence establishes the corpus delicti of possession of dangerous drugs for sale, we decline to address the state's argument that "the corpus delicti rule is not consistent with Arizona law."

¶13 Ochoa nevertheless contends that the "weights of the five packages of methamphetamine . . . were diminutive." He suggests that nine grams of methamphetamine "create[s] a presumption that the drugs were possessed for sale," and he points out that the total weight of all his packages was 2.6 grams, which he asserts is "nowhere near" nine grams. Section 13-3407(D) refers to a "threshold amount," which § 13-3401(36)(e) defines as nine grams of methamphetamine, but it affects a defendant's eligibility for probation, pardon, or early release from prison and says nothing about a presumption the drugs are for sale. *See also* A.R.S. §§ 13-3410(D)(1) ("threshold amount" related to "[s]erious drug offense" designation), 13-3419(A) ("threshold amount" used in sentencing). And Martinez described the multiple baggies of different weights as "not unusual at all" for someone who is selling drugs because "they . . . have different amounts that they're preparing to sell" and "they know what they're selling."

¶14 Ochoa also seems to suggest that the state failed to prove the methamphetamine was in his possession because the car belonged to his mother. "'Possess' means knowingly to have physical possession or otherwise to exercise dominion or control over property." A.R.S. § 13-105(34); *see also State v. Gonsalves*, 231 Ariz. 521, ¶¶ 9-10, 297 P.3d 927, 929 (App. 2013). Martinez saw Ochoa washing and driving the car. And while he was driving the car, Ochoa had the methamphetamine right next to him in the cup holder of the center console. The state thus presented sufficient evidence to permit the jury to infer that Ochoa possessed the methamphetamine. *Cf. State v. Moroyoqui*, 125 Ariz. 562, 564, 611 P.2d 566, 568 (App. 1980) (defendant had dominion and control over drugs in back seat of car he was driving).

Flat-Time Sentences

¶15 Ochoa also argues the trial court erred by imposing flat-time sentences for each of his convictions. The state agrees. We review de novo the trial court's interpretation and application of sentencing statutes. *State v. Hollenback*, 212 Ariz. 12, ¶ 12, 126 P.3d 159, 163 (App. 2005). In doing so, we look first to the plain language of the statute because it provides the most reliable indicator of the statute's meaning, and, in the absence of any ambiguity, we apply

that meaning without resorting to other methods of statutory interpretation. *State v. Gonzalez*, 216 Ariz. 11, ¶ 9, 162 P.3d 650, 653 (App. 2007).

¶16 The parties use the term "flat-time sentence" to describe a prison sentence in which the defendant is required to serve a full "calendar year" for each year of imprisonment imposed. *See* § 13-105(4) ("'Calendar year' means three hundred sixty-five days' actual time served without release, suspension or commutation of sentence, probation, pardon or parole, work furlough or release from confinement on any other basis."). In contrast, a defendant sentenced to "soft time" may be eligible for early release or parole before the end of his or her prison term. *See* A.R.S. §§ 41-1604.07 (earned-release credits), 41-1604.09 (parole); *see also Galaz v. Stewart*, 207 Ariz. 452, ¶¶ 6, 8, 88 P.3d 166, 167-68 (2004). Flat-time sentences are not permitted "unless specifically authorized per statute." *In re Webb*, 150 Ariz. 293, 294, 723 P.2d 642, 643 (1986); *see also State v. Harris*, 133 Ariz. 30, 31, 648 P.2d 145, 146 (App. 1982) (courts only have power to impose sentences authorized by statutes).

¶17 After finding that Ochoa had "three prior felony convictions in the state of Arizona, two of them within five years of the date of this offense," the trial court concluded that it was "appropriate to sentence [him] pursuant to" A.R.S. § 13-703, the repetitive-offender statute.[3] Consistent with § 13-703(J), the court sentenced Ochoa to the presumptive prison term for each offense. Ochoa asked the court if his sentences were flat time or if he was eligible for early release. The court responded that, under the statute, "[i]t appears to be flat" but told Ochoa's attorney that the court would "consider" a sentence other than flat time if he could "convince the [c]ourt" that it was allowed. Because Ochoa's

[3]Although the sentencing minute entry does not indicate that Ochoa was sentenced pursuant to § 13-703, the trial court orally indicated that it was sentencing Ochoa under that statute and his sentences are consistent with it. *See State v. Ovante*, 231 Ariz. 180, ¶ 38, 291 P.3d 974, 982 (2013) (when discrepancy between oral pronouncement and minute entry can be resolved by record, oral pronouncement controls).

attorney could point to no authority, the court imposed flat-time sentences.

¶18 The parties agree that "no sentencing statute appears to provide for flat-time prison terms" for Ochoa's convictions for possession of dangerous drugs, marijuana, and drug paraphernalia. We likewise are aware of no such authority, *see* A.R.S. §§ 13-703(O); 13-3405(A)(1), (B)(1); 13-3407(A)(1), (B)(1); 13-3415(A), and consequently we agree that Ochoa could not be sentenced to flat time for these offenses, *see Webb*, 150 Ariz. at 294, 723 P.2d at 643. Notably, the prison terms listed in § 13-703—the statute under which Ochoa was sentenced—are identified as "years," not "calendar years." *Compare* § 13-703(H)-(J), *with* A.R.S. § 13-710(A)-(B).

¶19 As a remedy, the parties ask us to amend the sentencing minute entry to remove the flat-time provisions of these sentences. We "can order the minute entry corrected if the record clearly identifies the intended sentence." *State v. Ovante*, 231 Ariz. 180, ¶ 38, 291 P.3d 974, 982 (2013). The trial court stated it was sentencing Ochoa as a repetitive offender under § 13-703. After imposing sentences consistent with that statute, the court indicated it would consider classifying the sentences as early release eligible if the statute allowed it, but the court was not aware of any such authority. The court's intent is therefore clear—it intended to impose the sentences it did, regardless of whether they were flat or soft time. We therefore amend the sentencing minute entry to eliminate the flat-time provision of Ochoa's sentences for possession of dangerous drugs, marijuana, and drug paraphernalia.

¶20 However, we disagree with the parties that there is no statutory authority for imposing a flat-time sentence for Ochoa's conviction for possession of dangerous drugs for sale. *See State v. Solis*, 236 Ariz. 242, ¶ 23, 338 P.3d 982, 989 (App. 2014) (appellate court not bound by state's concession). That conviction was based upon a violation of § 13-3407(A)(2), and § 13-3407(E) mandates calendar-year or flat-time prison terms for that offense when, as is the case here, the drug at issue is methamphetamine.

¶21 Because the trial court indicated it was sentencing Ochoa pursuant to § 13-703, despite the specific sentencing language

in § 13-3407(E), the parties directed us to *State v. Tarango*, 185 Ariz. 208, 914 P.2d 1300 (1996), which they suggest is controlling here. In *Tarango*, the defendant was convicted of a drug offense in violation of A.R.S. § 13-3408 but was sentenced as a repetitive offender under an earlier version of A.R.S. § 13-604, which is now, in relevant part, § 13-703. *Tarango*, 185 Ariz. at 209, 914 P.2d at 1301; *see also* 2008 Ariz. Sess. Laws, ch. 301, §§ 15, 28; 1997 Ariz. Sess. Laws, ch. 34, § 1. Section 13-3408 did not permit parole, whereas § 13-604 did. *Tarango*, 185 Ariz. at 209, 914 P.2d at 1301. Our supreme court found the general repetitive-offender sentencing provisions applied notwithstanding the existence of an offense-specific statute with special sentencing provisions. *Id.* at 210, 914 P.2d at 1302. The court noted that "[t]he state did not have to invoke" the repetitive-offender statute, but by doing so it subjected the defendant to "far more incarceration time," even considering the possibility of parole. *Id.* at 211-12, 914 P.2d at 1303-04. The court thus held: "When the state seeks the enhanced penalties for repeat offenders, A.R.S. § 13-604 provides an exclusive sentencing scheme." *Id.* at 209-10, 914 P.2d at 1301-02.

¶22 However, after *Tarango*, our legislature amended § 13-604(O) to include the following language: "The release provisions prescribed by this section shall not be substituted for any penalties required by the substantive offense or provision of law that specifies a later release or completion of the sentence imposed prior to release." 1997 Ariz. Sess. Laws, ch. 34, § 1. The legislature expressly indicated it intended to "overrule" *Tarango* and "to affirm [its] original intent . . . as enunciated in *State v. Behl*, 160 Ariz. 527, 774 P.2d 831 (App. 1989)." 1997 Ariz. Sess. Laws, ch. 34, § 3; *see also State v. Murray,* 194 Ariz. 373, ¶ 5, 982 P.2d 1287, 1288 (1999) (legislature concluded "*Behl* is the better rule and reinstate[d] that rule prospectively"). In *Behl*, this court affirmed the trial court's imposition of a flat-time prison sentence pursuant to A.R.S. § 13-1406(B), under which the defendant was convicted of sexual assault, although the offense was classified as dangerous under former § 13-604, which allowed parole. 160 Ariz. at 530, 774 P.2d at 834. We therefore disagree with the parties that *Tarango* is dispositive.

¶23 The language from § 13-604(O) that our legislature added in 1997 remains intact today in § 13-703(N). It plainly provides that the early release provisions of § 13-703 do not apply when another statute or provision of law specifies a later release or requires completion of the prison sentence before release. Ochoa was convicted of violating § 13-3407(A)(2) based on his possession of methamphetamine. In that situation, § 13-3407(E) expressly requires the court to impose a calendar-year prison term. Such a sentence does not include probation, pardon, parole, or release on any other basis. § 13-105(4). Thus, under § 13-703(N), § 13-3407(E) is another statute requiring completion of the prison sentence before release, and consequently the general release provisions of § 13-703 do not apply. We therefore conclude the trial court did not err by imposing a flat-time sentence for Ochoa's conviction for possession of dangerous drugs for sale.[4] *See Hollenback*, 212 Ariz. 12, ¶ 12, 126 P.3d at 163.

¶24 Ochoa also points out that in the sentencing minute entry count two is identified as possession of a dangerous drug for sale rather than possession of a dangerous drug. The indictment,

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[4]Section 13-3407(F) provides that a person, who is convicted of violating § 13-3407(A)(2) for possessing methamphetamine for sale, "is not eligible for suspension of sentence, probation, pardon or release from confinement on any basis until the person has served the sentence imposed by the court, the person is eligible for release pursuant to § 41-1604.07 or the sentence is commuted." In *State v. Hasson*, 217 Ariz. 559, ¶ 13, 177 P.3d 301, 304 (App. 2008), this court characterized § 13-3407(F) as "somewhat perplexing" given that § 13-3407(E) requires the imposition of a calendar-year or flat-time prison term. However, we resolved any ambiguity by looking to the legislature's intent of imposing calendar-year sentences for certain methamphetamine-related offenses. *Hasson*, 217 Ariz. 559, ¶¶ 12, 17, 177 P.3d at 304-05. And we concluded that § 13-3407(F) "does not provide for release credits because § 41-1604.07(A) specifically excludes eligibility for anyone 'sentenced to serve the full term of imprisonment imposed by the court.'" *Hasson*, 217 Ariz. 559, ¶ 16, 177 P.3d at 305.

the jury verdict, and the trial court's oral pronouncement at sentencing all indicate that count two is possession of a dangerous drug. Therefore, we also amend the sentencing minute entry to show count two as possession of a dangerous drug.

Disposition

¶25 For the reasons stated above, we affirm Ochoa's convictions. We amend the sentencing minute entry to reflect that count two is possession of dangerous drugs and to eliminate the flat-time provision of Ochoa's sentences for possession of dangerous drugs, marijuana, and drug paraphernalia; we otherwise affirm Ochoa's sentences.