IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ROBERT CHRISTOPHER KADRICH,
Appellant.

No. 2 CA-CR 2016-0023
Filed August 17, 2016

Appeal from the Superior Court in Pima County
No. CR20150884003
The Honorable Charles V. Harrington, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Amy M. Thorson, Assistant Attorney General, Tucson
Counsel for Appellee

Law Office of Sidney Wolitzky, Tucson
By Sidney F. Wolitzky
Counsel for Appellant

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Howard and Judge Staring concurred.

E S P I N O S A, Judge:

¶1 After a jury trial, Robert Christopher Kadrich was convicted of possession of a dangerous drug, methamphetamine, possession of drug paraphernalia, and possession of a deadly weapon by a prohibited possessor. The trial court sentenced him as a category-two repetitive offender to concurrent, presumptive prison terms, the longer of which was 4.5 years. On appeal, Kadrich argues the court abused its discretion by precluding certain evidence at trial, and contends there was insufficient evidence to support his convictions. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We review the facts in the light most favorable to sustaining the jury's verdicts. *State v. Payne*, 223 Ariz. 484, n.1, 314 P.3d 1239, 1251 n.1 (2013). In February 2015, Tucson Police Department officers served a search warrant on Kadrich's residence as part of an investigation unrelated to the present case. Kadrich was found in a bedroom "trying to conceal himself underneath the clothing in the closet." A search incident to his arrest revealed methamphetamine in a folded piece of tinfoil in Kadrich's pocket, and a handgun was later found in his bedroom.

¶3 During a four-day trial, Kadrich testified that both the gun and the drugs belonged to his roommate, whom Kadrich said he had evicted from the house earlier that day. Kadrich's girlfriend similarly testified the gun belonged to the roommate, as did the shirt Kadrich was wearing when he was arrested. Defense counsel informed the jury during opening statement that they would also hear from Kadrich's girlfriend's mother, who had seen the roommate leave the gun in Kadrich's room earlier that day. On the third day of trial, however, Kadrich's girlfriend said her mother had

been involved in an accident three days before and was in too much pain to come to court. The trial court denied Kadrich's request to introduce the mother's transcribed statement, and the jury found him guilty of all charges. Kadrich was sentenced as described above; we have jurisdiction over his appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Preclusion of Out-of-Court Statement

¶4 Kadrich first argues the trial court erred by denying his request to introduce the out-of-court statement of an unavailable witness. The trial court found the evidence that Kadrich's girlfriend's mother had "crashed on her bicycle, that she had her arm in a sling, and that she was in pain," an insufficient showing of unavailability. *See* Ariz. R. Evid. 804(a)(4) (witness considered "unavailable" if declarant cannot be present because of death or a then-existing infirmity, physical illness, or mental illness). We review the trial court's ruling for an abuse of discretion. *State v. Fillmore*, 187 Ariz. 174, 179, 927 P.2d 1303, 1308 (App. 1996).

¶5 In general, out-of-court statements, offered to prove the truth of the matter asserted, are inadmissible hearsay. *See* Ariz. R. Evid. 801(c), 802; *State v. Valencia*, 186 Ariz. 493, 497, 924 P.2d 497, 501 (App. 1996). When a witness becomes unavailable for trial, however, the rules of evidence provide limited exceptions to the general rule against hearsay. *See* Ariz. R. Evid. 804. The state suggested to the trial court that the "inconvenien[ce]" of testifying while in pain was insufficient to show the witness was unavailable. In denying Kadrich's request, the court noted, "over the years" it had been involved in cases "where people were much much greater infirmed" and still appeared at trial.

¶6 On appeal, Kadrich argues the trial court abused its discretion by excluding the transcribed testimony of the unavailable witness "even though it was clearly relevant and reliable and subject to cross-examination,"[1] citing Rule 804. But Kadrich misconstrues

[1]The statement Kadrich sought to admit was described as an interview conducted by the prosecutor at the Pima County Attorney's Office, in the presence of Kadrich's attorney and the

the rule. The first part of Rule 804(a) addresses the threshold requirement for a declarant to be considered unavailable for trial. Included in the definition of unavailability is a declarant who cannot testify at trial because of a "then-existing infirmity," which we assume Kadrich is referring to when he cites "Rule 804(4)." *See* Ariz. R. Evid. 804(a)(4). But the second part of the rule, 804(b), lists five circumstances in which hearsay statements may be admissible.[2] Thus, a declarant must not only fall within the several definitions of "unavailable" enumerated in part (a), but the statement which is to be offered must also fall within one of the exceptions to the rule against hearsay listed in part (b). Kadrich's references to Rule 804(a)(4) address only half of his burden.

¶7 Even assuming, arguendo, that Kadrich's girlfriend's mother was "unavailable" for trial because she was reported to be in pain, Kadrich has failed to show the statement he wished to present fell within one of the rule's exceptions for admitting hearsay. Under Rule 804(b)(1), former testimony is admissible if it was made under oath during a previous judicial proceeding or deposition. The statement offered here clearly does not fit that exception; we thus find no error in its exclusion by the trial court. *Cf. State v. Moreno*, 236 Ariz. 347, ¶ 5, 340 P.3d 426, 429 (App. 2014) (trial court's ruling upheld if legally correct for any reason supported by the record). For the same reasons, the trial court did not abuse its discretion in denying Kadrich's related motion for new trial.

Declining to Answer Jury Question

¶8 Kadrich next claims the trial court erred by refusing to answer a question posed by the jury regarding the whereabouts of

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witness's criminal defense attorney. Kadrich concedes the statement was not made under oath.

[2] The enumerated exceptions include former testimony, 804(b)(1); dying declarations, 804(b)(2); statements against interest, 804(b)(3); statements of personal or family history, 804(b)(4); and statements offered against a party that wrongfully caused the declarant's unavailability, 804(b)(6). Ariz. R. Evid. 804.

his former roommate, who he alleged was the owner of the gun and drugs. We review the court's response to a jury question for an abuse of discretion. *State v. Manuel*, 229 Ariz. 1, ¶ 35, 270 P.3d 828, 835 (2011).

¶9 During the noon recess on the third day of trial, a juror sent a note to the trial court asking "Where is [the roommate]?" Both parties advised the trial court they did not know, and the court referred the jury to the preliminary instruction which stated that "some of the questions that the[jury] ask[s] can't be asked." Later that same day, a detective informed defense counsel that he had determined the roommate was currently in prison, and Kadrich asked the court to relay the information to the jury. The state opposed the request, arguing the roommate's location was irrelevant and would "tend to cause more confusion with the jury than it would clarif[y]." The court noted it was "question[able] as to whether it's relevant to the circumstances in this case," and concluded that "even if it were relevant," any probative value of the roommate's circumstances was "substantially outweighed by the danger of confusing the issues, misleading the jury," and causing "needless . . . speculation."

¶10 Kadrich asserts the trial court abused its discretion by not allowing the new information to be conveyed to the jury, and argues "any question as to the relevance of the whereabouts of [the roommate] is obviated by the fact that a juror made the conscious effort to inquire about it." Kadrich cites no authority for that novel claim, nor are we aware of any.

¶11 In *State v. Dann*, our supreme court explained that trial court's should apply Rules 401, 402, and 403 of the Arizona Rules of Evidence in determining the admissibility of third-party culpability evidence. 205 Ariz. 557, ¶ 33, 74 P.3d 231, 242 (2005). The court clarified that the inquiry should be focused "on the effect 'the evidence has upon the *defendant's* culpability,'" and it will be relevant if it "*tend[s]* to create a reasonable doubt as to the defendant's guilt." *Id.*, *quoting State v. Gibson*, 202 Ariz. 321, ¶ 16, 44 P.3d 1001, 1004 (2002) (alteration added) (emphasis added in *Gibson*). If relevant, such evidence is admissible "unless its probative value is substantially outweighed by the danger of unfair

prejudice, confusion of the issues, or misleading the jury." *Id.*, *quoting Gibson*, 202 Ariz. 321, ¶ 13, 44 P.3d at 1003.

¶12 The trial court applied the appropriate legal test. It first found the relevance of the roommate's whereabouts "question[able]," but nevertheless concluded that any probative value was "substantially outweighed" by Rule 403 considerations. Kadrich provides no support for the notion that the trial court's discretion is negated or limited when the jury asks for the evidence in question, nor does he persuasively argue the court erred in finding any probative value outweighed by its prejudicial effect. Because none of the reasons for denying Kadrich's request are "clearly untenable, legally incorrect, or amount to a denial of justice," we cannot say the court abused its discretion. *State v. Herrera*, 232 Ariz. 536, ¶ 19, 307 P.3d 103, 112 (App. 2013).

Sufficiency of the Evidence

¶13 Kadrich lastly contends that because he "was asleep" when the police found him in his closet, there was insufficient evidence he had knowingly possessed the gun and the drugs. In support, he relies on a federal case that concluded there was insufficient evidence to support a prohibited possessor conviction when police discovered the defendant asleep on a couch with two guns leaning against him. *United States v. Nevils*, 548 F.3d 802, 804, 810-11 (9th Cir. 2008). That decision, however, was vacated after rehearing by an en banc panel that concluded "a rational juror could find beyond a reasonable doubt that [defendant] knowingly possessed the firearms . . . notwithstanding evidence that he was asleep," and because the evidence had not been construed in the light most favorable to upholding the conviction, *United States v. Nevils*, 598 F.3d 1158, 1163-64 (9th Cir. 2010), the same standard employed by Arizona's courts, *see State v. Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d 912, 914 (2005) ("In determining whether substantial evidence exists, we view the facts in the light most favorable to sustaining the jury verdict and resolve all inferences against [the defendant]."). And in *Stroud*, our supreme court described substantial evidence as that which reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt. 209 Ariz. 410, ¶ 6, 103 P.3d at 913-14.

¶14 Viewed in the appropriate light, there was more than sufficient evidence to support Kadrich's conviction. As the state points out, the evidence that he was sleeping was "at best, conflicting." The officer who found Kadrich in his bedroom closet testified he had observed someone "trying to conceal himself underneath the clothing in the closet," and when asked if the person was sleeping, the officer responded "I don't remember[,] I don't think he was." Further, although Kadrich testified he had fallen asleep in the closet hours before police arrived, he did not state he had actually been asleep when they executed the search warrant in his house.

¶15 Regardless, even if Kadrich had been asleep when police found him, there was sufficient evidence for a jury to conclude he constructively possessed both the gun and the drugs. Constructive possession, proven by either direct or circumstantial evidence, exists when prohibited property is found in a place under a person's dominion or control in such circumstances that it can be reasonably inferred the person had actual knowledge of the property. *State v. Cox*, 214 Ariz. 518, ¶ 10, 155 P.3d 357, 359 (App. 2007). The evidence at trial showed a .38 Smith and Wesson revolver was found in a case on top of a keyboard in Kadrich's bedroom, in the home he owned with his parents, and the methamphetamine was found in the shirt he was wearing. Although Kadrich, his girlfriend, and Kadrich's mother all testified that either the gun or the drugs, or both, were not his, the credibility of such testimony was determined by the jury and will not be disturbed on appeal. *State v. Clemons*, 110 Ariz. 555, 556-57, 521 P.2d 987, 988-89 (1974) ("No rule is better established than that the credibility of witnesses and the weight and value to be given to their testimony are questions exclusively for the jury."). Thus, the jury was free to disbelieve Kadrich's self-serving testimony and reject his defense. And to the extent Kadrich asks us to reweigh the evidence, that is something we will not do. *See State v. Lee*, 189 Ariz. 590, 603, 944 P.2d 1204, 1217 (1997); *State v. Buccheri-Bianca*, 233 Ariz. 324, ¶ 38, 312 P.3d 123, 133 (App. 2013).

Disposition

¶16 For the foregoing reasons, Kadrich's convictions and sentences are affirmed.