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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. DWAYNE CHILDS, Appellant.	2 CA-CR 2010-0304 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20092255001

Honorable Terry L. Chandler, Judge

AFFIRMED

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K E L L Y, Judge.

¶1 Dwayne Childs appeals from his convictions, following a jury trial, of conspiracy to possess marijuana for sale and possession of marijuana for sale. He argues it was fundamental error for the trial court to exclude from evidence a portion of his

statement to police and insufficient evidence supported his convictions. Finding no error, we affirm.

¶2 In June 2009, Lanann Wells contacted an undercover police officer, who had been posing as a seller of marijuana, to arrange for the purchase of forty pounds of marijuana. When they met at a restaurant several days later, the officer gave Wells a sample of marijuana wrapped in plastic and told her the forty pounds of marijuana would cost $375 per pound. Wells was accompanied by Shameika Gully. Detectives initially followed Wells and Gully, but broke off the surveillance. Their sport utility vehicle (SUV), however, was later seen at a Days Inn in Tucson. Several days earlier, Gully had rented Room 125 at that motel.

¶3 Wells contacted the undercover officer the evening of their meeting at the restaurant and agreed to purchase the marijuana, initially telling him she wanted to meet sometime the following day. A short time later, she called the officer again and said she instead wanted to buy the marijuana that evening. Although Wells first stated she wanted to conduct the transaction at her home, the officer suggested a hotel, and Wells told him to rent a room at the Days Inn.

¶4 The undercover officer rented Room 116 at the motel, took two bales of marijuana to the room, and called Wells. Shortly after the officer arrived, Childs emerged from Room 125 and looked towards Room 116. When Wells arrived, she went to Room 116. She initially asked the officer if she could take one of the bales to show Gully, but instead took another sample wrapped in plastic because the bale was too heavy for her to carry.

¶5 Wells left Room 116 and began talking on her cellular telephone, taking a circuitous route to Room 125. She entered Room 125 for a few minutes, then retraced her steps to Room 116. Shortly afterward, Childs called Gully. After Wells told the undercover officer she would go ahead with the purchase, she made a telephone call. Gully then arrived with approximately $15,000 in cash. After the officer carried the bales to the SUV, Gully and Wells were arrested. Police officers then went to Room 125, where they arrested Childs.

¶6 A search of Room 125 revealed marijuana and packing materials consistent with the samples the undercover officer had given Wells, and four cellular telephones. Analysis of those telephones showed, in addition to Childs's call to Gully during the drug transaction, that Gully and Childs had spoken immediately before Wells had called the officer to change the time of their meeting, and again a few minutes before Childs came out of Room 125 to look toward Room 116. Childs was charged and convicted as described above and was sentenced to concurrent, presumptive five-year prison terms.

Jurisdiction

¶7 The state asserts that we lack jurisdiction over this appeal based on A.R.S. § 13-4033(C) because Childs absconded during trial and was not sentenced until more than ninety days after his conviction. Section 13-4033(C) provides that a defendant may not appeal a verdict or the denial of a motion for new trial "if the defendant's absence prevents sentencing from occurring within ninety days after conviction and the defendant fails to prove by clear and convincing evidence at the time of sentencing that the absence was involuntary." Childs was not warned by the trial court that a voluntary absence

could affect his right to appeal and, in fact, was informed at sentencing that he had a right to appeal. The state acknowledges that, pursuant to this court's recent decision in *State v. Bolding*, 227 Ariz. 82, 253 P.3d 297 (App. 2011), § 13-4033(C) therefore does not apply. The state argues, however, that *Bolding* is incorrectly decided.

¶8 We need not reach that question here because, even assuming express notice of § 13-4033(C) is unnecessary for a defendant to knowingly waive his or her right to an appeal, § 13-4033(C) is nonetheless inapplicable. Although Childs was not sentenced until more than ninety days after he was found guilty, he was returned to custody fewer than eighty days after the jury verdicts. In *State v. Soto*, 225 Ariz. 532, ¶ 4, 241 P.3d 896, 896 (2010), our supreme court determined that § 13-4033(C) did not apply to a defendant who had been "returned to custody within ninety days of [the statute's effective date]." *See also* Ariz. Const. art. IV, pt. 1, § 1(3); 2008 Ariz. Sess. Laws, ch. 25, § 1; *Bolding*, 227 Ariz. 82, ¶ 3, 253 P.3d at 281. Accordingly, the crucial date is not when the defendant is actually sentenced, but instead when he or she is returned to the state's custody. Because Childs was returned to custody within ninety days, § 13-4033(C) does not apply. Further, Childs requested that he be sentenced immediately, but the trial court set his sentencing approximately a month later. And, during at least some portion of Childs's absence, he was incarcerated in another state, rendering that portion of his absence involuntary. *See State v. Sainz*, 186 Ariz. 470, 473 n.1, 924 P.2d 474, 477 n.1 (App. 1996). Thus, the record does not show that Childs's voluntary absence delayed his sentencing for more than ninety days, and § 13-4033(C) therefore does not bar his appeal.

Statement to Police

¶9 Childs argues that fundamental, prejudicial error occurred when the trial court precluded a portion of his statement to police in which he said his daughter lived with Gully in Tucson. A juror question directed towards a police officer who had interviewed Childs asked: "What is the relationship between Mr. Childs and Ms. Gully and Ms. Wells?" Childs asserted the officer could answer that question based on Childs's statement to police about his daughter. Childs reasoned that, absent an answer to the juror question, the jury would "assume the worst," and that the jury had "[a] right to know what relationship" Childs had with Wells and Gully. The trial court instead determined the statement was inadmissible hearsay, and the question was not asked.

¶10 Before the officer testified, another officer had stated that Childs had a Tennessee identity card when he was arrested, but had told the officer he lived in Illinois. Childs asserts that his statement about his daughter was therefore admissible pursuant to the rule of completeness, Rule 106, Ariz. R. Evid., which provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." Thus, Childs reasons, his statement about his daughter was necessary to explain his statement that he was from Illinois, and therefore was admissible in response to the jury question.

¶11 As Childs acknowledges, because he did not raise this argument below, we review only for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005); *see also State v. Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d

682, 683 (App. 2008) (objection to evidence on one ground does not preserve appellate argument on another ground). The state asserts that Rule 106 does not apply to the officer's testimony because it was not a recording or written statement. Childs responds that the first officer, during his testimony, used his notes of his interview with Childs and that Rule 106 therefore applies because he "refer[red] to a writing." We need not determine whether the officer's use of notes qualifies his testimony as a written or recorded statement under Rule 106 because, as our supreme court has noted, the rule of completeness is only partially codified in Rule 106, and its rationale also applies to oral testimony about a person's statement.[1] *See State v. Ellison*, 213 Ariz. 116, n.9, 140 P.3d 899, 914 n.9 (2006).

¶12 "Under the rule of completeness, . . . only the portion of a statement 'necessary to qualify, explain or place into context the portion already introduced' need be admitted." *State v. Cruz*, 218 Ariz. 149, ¶ 58, 181 P.3d 196, 209 (2008), *quoting State v. Prasertphong*, 210 Ariz. 496, ¶ 15, 114 P.3d 828, 831 (2005). It "does not create a rule of blanket admission for all exculpatory statements simply because an inculpatory statement was also made." *Id.* The trial court's preclusion of Childs's statement about his daughter did not violate Rule 106. Childs's statement that his daughter lived in Tucson with Gully may have explained why he was present in Tucson, but is only

[1]We additionally question whether the rule of completeness may be invoked in these circumstances—where a witness has been asked a question that arguably could be answered by providing an additional part of a statement that was introduced into evidence by another witness. For the sake of argument, we will assume this does not bar application of Rule 106, as it appears the two statements were made somewhat contemporaneously and the second officer was aware of both.

tangentially related to his statement that he lived in Illinois.[2] Indeed, the jury was already aware that Childs was not from Tucson, as he was carrying a Tennessee identity card when he was arrested. His statement about his daughter simply does not qualify, explain, or place into context his statement that he lived in Illinois, not Tennessee. *See Cruz*, 218 Ariz. 149, ¶ 58, 181 P.3d at 209. Accordingly, Childs has not shown error, fundamental or otherwise.

Sufficiency of the Evidence

¶13 Childs next argues insufficient evidence supported his convictions. He first contends there was no evidence he physically or constructively possessed the marijuana in Room 116 that was subsequently loaded into the SUV. He also asserts there was no evidence he acted as an accomplice in Wells's and Gully's possession of the marijuana for sale and, in a related argument, contends there was insufficient evidence that he was part of a conspiracy to obtain the marijuana. We need not address his first argument because we find sufficient evidence that he acted as an accomplice and that he participated in a conspiracy.

¶14 We review the sufficiency of the evidence de novo. *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993). "A conviction must be supported by substantial evidence of guilt." *State v. Martinez*, 226 Ariz. 221, ¶ 12, 245 P.3d 906, 908

[2]Childs's statement that he was from Illinois was only inculpatory insofar as it suggested a link to the cellular telephones found in Room 125, which had Illinois area codes. But there was other evidence linking Childs to those telephones, as both Gully's and Wells's cellular telephones listed those telephones' assigned numbers under "Dwayne."

(App. 2011). "Substantial evidence is more than a mere scintilla and is such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990), *quoting State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980). "The substantial evidence required for conviction may be either circumstantial or direct. . . ." *State v. Anaya*, 165 Ariz. 535, 543, 799 P.2d 876, 884 (App. 1990). And, "[t]o set aside a jury verdict based on insufficient evidence, it must clearly appear that, on any hypothesis, there is no sufficient evidence to support the conclusion reached by the jury." *Martinez*, 226 Ariz. 221, ¶ 12, 245 P.3d at 908-09.

¶15 A person is criminally liable as an accomplice if that person, "with the intent to promote or facilitate the commission of an offense," either "solicits or commands another person to commit the offense"; "[a]ids, counsels, agrees to aid or attempts to aid another person in planning or committing an offense"; or "[p]rovides means or opportunity to another person to commit the offense."[3] A.R.S. §§ 13-301, 13-303(A)(3). A person is guilty of conspiracy if, "with the intent to promote or aid the commission of an offense, such person agrees with one or more persons that at least one

[3]Childs additionally asserts, relying on § 13-303(B), that in order for him to be liable as an accomplice he must have known that his conduct "would result in the possession of the marijuana for sale." Section 13-303(B) provides that, in certain circumstances, a person is liable as an accomplice only if they "act[] with the kind of culpability . . . sufficient for the commission of the offense." But § 13-303(B) is restricted to crimes where "causing a particular result is an element of [the] offense," and therefore does not apply to possession of marijuana for sale, because that crime does not have a particular result as an element. *See* A.R.S. § 13-3405(A)(2) (person "shall not knowingly . . . [p]ossess marijuana for sale").

of them or another person will engage in conduct constituting the offense and one of the parties commits an overt act in furtherance of the offense." A.R.S. § 13-1003(A).

¶16 Childs asserts the evidence was insufficient that he was aware of, much less intended to aid in or agreed to, a plan to purchase marijuana for sale. In support of his argument, he cites cases standing for the proposition that telephone calls, when their content is unknown, cannot support a conspiracy conviction standing alone, or even when combined with the defendant's presence during the planning of the crime. *See, e.g.*, *United States v. Santos*, 449 F.3d 93, 104 (2d Cir. 2005) (mere presence at meeting combined with telephone records "indicat[ing] close contact" with conspirators insufficient); *United States v. Williams*, 264 F.3d 561, 574 (5th Cir. 2001) ("telephone records [alone] are insufficient evidence to support conspiracy conviction" but such records nonetheless "make[] the existence of the conspiracy, and Defendant's participation in it, more likely"); *United States v. Sisca*, 503 F.2d 1337, 1343 (2d Cir. 1974) ("mere attendance at a meeting or knowledge of a conspiratorial act" insufficient evidence of conspiracy).

¶17 The cases Childs cites are readily distinguishable because they address conduct far more attenuated from the criminal conduct than Childs's actions here. At best, they stand for the proposition that Childs's conduct, if viewed piecemeal, is insufficient to support the jury verdicts. But the jury does not view the evidence piecemeal. Instead, "it is the jury's function to weigh the evidence as a whole, to resolve any inconsistencies therein and then to determine whether or not a reasonable doubt exists." *State v. Parker*, 113 Ariz. 560, 561, 558 P.2d 905, 906 (1976). When viewed in

its entirety, Childs's conduct went well beyond mere presence, and the telephone calls correlated closely with Wells's and Gully's actions in obtaining the marijuana for sale.

¶18 First, the jury could conclude that Childs was aware of the pending transaction; shortly after speaking with Gully, he came out of Room 125 to look at the undercover officer arriving at Room 116. Further, based on the telephone calls, the jury could conclude Wells and Gully had agreed to purchase the marijuana and changed the time of the meeting after consulting with Childs. And the evidence permitted the inference Wells went to Room 125 to show him the sample she obtained in Room 116 before confirming the sale, because those samples were in Room 125 when Childs was arrested.[4] Additionally, Childs spoke with Gully before she brought the money to Room 116. Thus, viewing the evidence as a whole, the jury could conclude Childs played a role in deciding when, where, and whether to complete the transaction and actively participated in the transaction itself by evaluating the sample Wells took from Room 116 to Room 125. This evidence amply supports his convictions for possession of marijuana for sale based on accomplice liability and conspiracy to commit possession of marijuana for sale.

¶19 Finally, Childs argues "the instruction on accomplice liability for foreseeability improperly permitted the jury to convict him as an accomplice." But he

[4]Childs notes the police officers involved did not confirm that the marijuana found in his room was the same marijuana the undercover officer had given Wells. But nothing in the record suggests Wells had either sample when she was arrested, and no other marijuana was found. Thus, the jury readily could conclude the marijuana and packaging materials found in Room 125 were from the samples the undercover officer had given Wells.

identifies no improper jury instruction, instead referring to statements made by the prosecutor during closing that Childs asserts improperly suggested to the jury that he could be found guilty as an accomplice "if he was guilty of conspiracy because he was an accomplice to the conspiracy." We find nothing in the prosecutor's closing argument that can fairly be characterized in the fashion Childs describes. In any event, even assuming the prosecutor misstated the law, Childs cites no authority and develops no argument suggesting his convictions should be reversed on that basis. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (argument shall contain citation to authority). Accordingly, we conclude that he has waived this argument and we do not address it further. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (insufficient argument on appeal waives claim).

¶20 Childs's convictions and sentences are affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge