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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. MURITALA OLAYINKA AJIBOYE, Appellant.	)	2 CA-CR 2010-0322 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20094220002

Honorable Richard S. Fields, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Amy M. Thorson
Tucson
Attorneys for Appellee

The Roach Law Firm
By Bradley Roach
Tucson
Attorneys for Appellant

B R A M M E R, Judge.

¶1 Muritala Ajiboye was convicted after a jury trial of possession of marijuana for sale and possession of drug paraphernalia. He was sentenced to concurrent, presumptive and mitigated prison terms, the longer of which was three years. On appeal, he argues the trial court erred in denying his motion to preclude evidence based on chain-of-custody grounds and by denying his motion for a judgment of acquittal made pursuant to Rule 20, Ariz. R. Crim. P. He additionally argues the reasonable doubt instruction given to the jury pursuant to *State v. Portillo*, 182 Ariz. 592, 898 P.2d 970 (1995), constitutes structural error. We affirm.

¶2 "We view the evidence in the light most favorable to upholding the jury's verdict." *State v. Mangum*, 214 Ariz. 165, ¶ 3, 150 P.3d 252, 253 (App. 2007). On October 22, 2009, Ajiboye signed a lease to move from one apartment, #1206, to apartment #1208 in the same complex. Although that lease was to begin October 25, Ajiboye had not yet returned his keys for #1206 to the complex's financial manager by October 29. That day, a carpet cleaner hired to clean #1206 reported to the finance manager that the apartment smelled of marijuana. After calling the police and going to the apartment, the finance manager found two bales of marijuana in the kitchen pantry, which he then moved to a storage room in the apartment complex's office. When officers arrived, they seized the marijuana from the storage room and searched #1206, finding additional marijuana in a plastic bag, as well as plastic wrap, plastic gloves, and fabric softener sheets—items commonly used in the packaging of marijuana. Upon searching #1208, officers found a document a detective characterized as a drug ledger. A search of Ajiboye's car, parked in the complex parking lot, revealed packaging tape, plastic wrap, and two scales.

¶3 Ajiboye first argues that, due to discrepancies in the chain of custody of the marijuana, there was insufficient foundation that the marijuana presented at trial[1] and tested by a criminalist was the marijuana found in #1206. We review for an abuse of discretion a trial court's conclusion that evidence has an adequate foundation. *See State v. McCray*, 218 Ariz. 252, ¶ 8, 183 P.3d 503, 507 (2008).

¶4 Rule 901, Ariz. R. Evid., provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." "A party seeking to authenticate evidence based on a chain of custody 'must show continuity of possession, but it need not disprove every remote possibility of tampering.'" *McCray*, 218 Ariz. 252, ¶ 9, 183 P.3d at 507, *quoting State v. Spears*, 184 Ariz. 277, 287, 908 P.2d 1062, 1072 (1996). The trial court "does not determine whether the evidence is authentic, but only whether evidence exists from which the jury could reasonably conclude that it is authentic." *State v. Lavers*, 168 Ariz. 376, 386, 814 P.2d 333, 343 (1991). Thus, the state had to provide sufficient evidence for the jury to conclude the marijuana discussed at trial was the same marijuana found in #1206 on October 29.

¶5 Ajiboye contends the chain of custody was inadequate here for three reasons: (1) the finance manager had moved the bales before police arrived, and the officers therefore did not see the bales in #1206; (2) the marijuana discussed at trial and tested by the criminalist had been labeled by the collecting officer with a date of October 20, 2009—more than a week before the marijuana had been seized in this case; and (3) the collecting officer had not initially signed the evidence seal for the core sample and did not immediately submit the logs showing the marijuana bales' weight.

[1]The marijuana bales were not shown to the jury, but the jury was shown photographs of the bales and core samples taken from them.

¶6 None of these facts render the marijuana's foundation inadequate. Although the marijuana was moved from #1206 before police arrived, the finance manager testified that he had moved it, thus showing continuity of possession. *See McCray*, 218 Ariz. 252, ¶ 9, 183 P.3d at 507. Similarly, the collecting officer stated he had placed the bales into evidence on October 29, explaining that he inadvertently had entered the wrong date in the computer and first had sent the weight logs to the wrong department before correcting the error. And his description of events was corroborated by an evidence technician, who testified the marijuana had been deposited on October 29. Based on that evidence, the jury clearly could conclude the marijuana discussed at trial was the same marijuana found in #1206 by the finance manager. Finally, Ajiboye does not explain how the officer's failure to sign the evidence seal relates to the chain of custody. At most, that fact suggests the marijuana was vulnerable to tampering, not that the evidence was at any point unaccounted for. Ajiboye identifies no evidence in the record suggesting anyone had tampered with the marijuana. *Cf. State v. Ritchey*, 107 Ariz. 552, 557, 490 P.2d 558, 563 (1971) (even if state cannot show continuous chain of custody, identified evidence still admissible absent proof of tampering or "actual change in the evidence").

¶7 Ajiboye next asserts the evidence was insufficient to show he had possessed drug paraphernalia or marijuana for sale, and the trial court therefore erred in denying his motion for a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P. We review a trial court's decision on a Rule 20 motion de novo, viewing the evidence in the light most favorable to upholding the verdict. *State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011). A trial court does not err in denying a Rule 20 motion if "'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.'" *Id.* ¶ 16, *quoting State v. Mathers*, 165 Ariz. 64, 66, 796 P.2d 866, 868 (1990). Ajiboye's arguments depend entirely on his claim that the chain of custody was inadequate. Because we have rejected that claim, his arguments that the evidence was insufficient also fail.

¶8 In his final argument, Ajiboye contends the trial court's use of the jury instruction on reasonable doubt mandated by our supreme court in *Portillo* "improperly defines 'reasonable doubt' as being less than that which federal due process requires and improperly shifts the burden of proof to a defendant resulting in structural error." Our supreme court has rejected similar challenges to the *Portillo* instruction, *see, e.g.*, *State v. Ellison*, 213 Ariz. 116, ¶ 63, 140 P.3d 899, 916 (2006); *State v. Dann*, 205 Ariz. 557, ¶ 74, 74 P.3d 231, 249-50 (2003), and we are bound to follow our supreme court's decisions, *State v. Sullivan*, 205 Ariz. 285, ¶ 15, 69 P.3d 1006, 1009 (App. 2003). Accordingly, we do not address this argument further.

¶9 For the reasons stated, we affirm Ajiboye's convictions and sentences.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge