DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellant, v. KEVIN OTTAR and RUAN JUNIOR HAMILTON Appellees.	)	No. 1 CA-CR 11-0592 1 CA-CR 11-0600 (Consolidated) DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause Nos. CR2010-155798-001 and CR2010-155798-002

The Honorable Paul J. McMurdie, Judge

REVERSED

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S W A N N, Judge

¶1 The state appeals the superior court's order dismissing the prosecution of Kevin Ottar and Ruan Junior Hamilton (collectively, "Defendants") for possession of marijuana for sale. We conclude that the indictment was not insufficient, and therefore reverse.

FACTS AND PROCEDURAL HISTORY

¶2 Defendants and two others were indicted for multiple drug-related offenses, including possession of marijuana for sale ("Count III"). Count III of the indictment charged:

> RUAN JUNIOR HAMILTON and KEVIN OTTAR, on or between the 1st day of October, 2010 and the 18th day of October, 2010, knowingly possessed for sale an amount of marijuana having a weight of four pounds or more, having a weight or value which exceeds the statutory threshold amount, in violation of A.R.S. §§ 13-3401, 13-3405, 13-3418, 13-301, 13-302, 13-303, 13-304, 13-701, 13-702, and 13-801.

¶3 Before trial, Defendants moved to dismiss Count III pursuant to Ariz. R. Crim. P. 16.6(b), arguing that the charge was insufficient as a matter of law. Defendants contended that they could not be guilty of the charged offense because the "facts" set forth in the police reports and the grand jury proceedings established that they never possessed the marijuana. Specifically, Defendants contended that because the charge stemmed from a "reverse sting" operation in which the police sold marijuana to them but never intended to permit them to

leave with the marijuana, it was factually impossible for them to possess the marijuana or exercise the dominion or control required to transfer or sell it.

¶4 After hearing oral argument on Defendants' motion, the court granted the motion in part, ruling that the state could proceed on Count III as *attempted* possession of marijuana for sale only. The court explained:

> After reviewing all the materials, it's the determination of the Court that based on the factual assertions as stated here that the Defendants never criminally possessed the marijuana as set forth in the indictment because legally the police officers were never going to allow them to possess it, per se.
>
> Therefore, the Court will grant the motion as it relates to the greater charge, but allow the case to go forward on the lesser charge of attempt.

¶5 On the state's motion, the court dismissed the remaining charges without prejudice. The state appeals the dismissal of the offense charged in Count III. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4032(1).

DISCUSSION

¶6 Rule 16.6(b) requires that an indictment, information, or complaint be dismissed on the defendant's motion if it is "insufficient as a matter of law." We review the superior

court's ruling on a Rule 16.6(b) motion to dismiss for an abuse of discretion. *State v. Far West Water & Sewer Inc.*, 224 Ariz. 173, 187, ¶ 35, 228 P.3d 909, 923 (App. 2010). An abuse of discretion occurs where the court's reasons for its actions are "clearly untenable, legally incorrect, or amount to a denial of justice." *State v. Chapple*, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n.18 (1983).

¶7 A motion to dismiss an indictment tests the indictment's legal sufficiency. *State v. Kerr*, 142 Ariz. 426, 431, 690 P.2d 145, 150 (App. 1984). Legal sufficiency is measured by whether the indictment informs the defendant of the essential elements of the charge, is definite enough to permit the defendant to prepare a defense, and protects the defendant from later prosecution for the same offense. *State v. Rickard-Hughes*, 182 Ariz. 273, 275, 895 P.2d 1036, 1038 (App. 1995). The inquiry does not address whether there are valid factual defenses to the charge. *Kerr*, 142 Ariz. at 431, 690 P.2d at 150. Nor does it address the "nature, weight or sufficiency of the evidence presented to the grand jury." *Crimmins v. Superior Court (Collins)*, 137 Ariz. 39, 42-43, 668 P.2d 882, 885-86 (1983); *see also Rickard-Hughes*, 182 Ariz. at 275, 895 P.2d at 1038 ("Rule 16.6(b) is not the proper procedural means for dismissal when the trial judge believes the evidence against the defendant is insufficient to go to the jury."). But where the

parties agree on facts that would make a conviction *impossible*, the court may properly consider those facts. In *Mejak v. Granville*, for example, our supreme court held that an indictment charging the defendant with luring a minor for sexual exploitation was insufficient where it was undisputed that the person solicited was neither a minor nor a peace officer posing as a minor as required by the statute defining the offense.[1] 212 Ariz. 555, 136 P.3d 874 (2006). The court explained that "[i]f a defendant can admit to all the allegations charged in the indictment and still not have committed a crime, then the indictment is insufficient as a matter of law." *Id.* at 556, ¶ 4, 136 P.3d at 875.

¶8 Here, the state does not dispute that the police never intended to allow Defendants to leave with the marijuana. But here, unlike in *Mejak*, that undisputed fact did not make Defendants' convictions impossible. A person is guilty of possession of marijuana for sale if he knowingly possessed marijuana for the purpose of sale. A.R.S. § 13-3405(A)(2). To "possess" is "knowingly to have physical possession or otherwise to exercise dominion or control over property." A.R.S. § 13-105(34). The fact that the police never intended to allow

[1] The luring statute, A.R.S. § 13-3554, was later amended to eliminate the requirement that the person solicited be either a minor or a peace officer posing as a minor. 2007 Ariz. Sess. Laws, ch. 248, § 8 (1st Reg. Sess.).

Defendants to leave with the marijuana did not make it impossible for Defendants to have possessed the marijuana and committed the charged offense. The superior court's conclusion that this fact rendered the charge insufficient was legally incorrect. Count III was legally sufficient and should not have been dismissed.

CONCLUSION

¶9 For the reasons set forth above, we reverse the superior court's order dismissing the charge of possession of marijuana for sale. We express no opinion as to whether the evidence developed at trial will prove sufficient to sustain convictions.

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
JOHN C. GEMMILL, Presiding Judge

/s/
_____
ANDREW W. GOULD, Judge