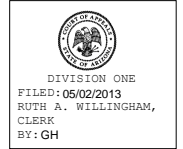


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 12-0113
)
Appellee,) DEPARTMENT C
)
v.) MEMORANDUM DECISION
)
ANGEL FELIX-RUIZ,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)

Appeal from the Superior Court in Mohave County

Cause No. S8015CR201100231

The Honorable Derek C. Carlisle, Judge *Pro Tempore*

AFFIRMED

Thomas C. Horne, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Adriana M. Zick, Assistant Attorney General
Attorneys for Appellee

Jill L. Evans, Mohave County Appellate Defender Phoenix
Attorneys for Appellant

J O H N S E N, Judge

¶1 Angel Felix-Ruiz appeals his convictions of possession
of a dangerous drug for sale and possession of drug

paraphernalia. He contends insufficient evidence supports his convictions and argues the superior court erred in instructing the jury. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶12 Police executed a search warrant at the home in which Felix-Ruiz lived with his wife and two teenage children. In a locked detached shed next to the house, officers discovered 31.4 grams of methamphetamine with a street value of \$3,140 hidden in a spray paint can. In the same shed, officers also found small plastic bags, white crystalline residue on a small digital scale, a "drug ledger" and mail addressed to Felix-Ruiz and his wife. The shed was equipped with a video surveillance system that relayed live images of the driveway and entryway to a television monitor inside the shed.

¶13 At trial, the superior court denied Felix-Ruiz's motion for a judgment of acquittal under Rule 20 of the Arizona Rules of Criminal Procedure. Felix-Ruiz argued the evidence merely established his presence at the home and did not "tie" him to the drugs and paraphernalia in the shed. Felix-Ruiz did not testify and did not present any evidence. Over his objection, the court declined to expressly instruct the jury that, in deciding whether to convict Felix-Ruiz, it should not consider his decision not to testify.

¶14 The jury found Felix-Ruiz guilty of one count of possession of dangerous drugs for sale (methamphetamine), a Class 2 felony, and one count of possession of drug paraphernalia, a Class 6 felony. The court imposed concurrent mitigated terms of imprisonment. We have jurisdiction of Felix-Ruiz's timely appeal pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (West 2013), 13-4031 (West 2013) and - 4033(A)(1) (West 2013).¹

DISCUSSION

A. Sufficiency of Evidence.

¶15 Felix-Ruiz argues his convictions should be overturned because the evidence was insufficient to prove he possessed the methamphetamine and paraphernalia discovered in the shed. Specifically, he contends the evidence failed to demonstrate that he knowingly exercised dominion and control over the illicit materials.

¶16 We review a claim of insufficient evidence *de novo*. *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993). We determine only whether substantial evidence exists to support the verdict. Ariz. R. Crim. P. 20(a); see also *State v. Scott*, 177 Ariz. 131, 138, 865 P.2d 792, 799 (1993). Substantial

¹ Absent material revision after the date of an alleged offense, we cite a statute's current version.

evidence 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) (quotation omitted).

¶17 We view the evidence in a light most favorable to sustaining the verdict. *Bible*, 175 Ariz. at 595, 858 P.2d at 1198. We will reverse a conviction only if there is a complete absence of probative facts supporting the conviction. *State v. Scott*, 113 Ariz. 423, 424-25, 555 P.2d 1117, 1118-19 (1976). In our review, we do not distinguish "between the probative value of direct and circumstantial evidence." *Bible*, 175 Ariz. at 560 n.1, 858 P.2d at 1163. Moreover, the State does not have "to negate every conceivable hypothesis of innocence when guilt has been established by circumstantial evidence." *State v. Nash*, 143 Ariz. 392, 404, 694 P.2d 222, 234 (1985).

¶18 The State was required to prove beyond a reasonable doubt that Felix-Ruiz possessed the methamphetamine and paraphernalia discovered in the shed. See A.R.S. §§ 13-3401(6)(b)(xxxiv) (West 2013), -3407(A)(2) (West 2013). "Possess" means "knowingly to have physical possession or otherwise to exercise dominion or control over property." A.R.S. § 13-105(34) (West 2013). "'Control' is defined as 'have power over'; 'dominion' as 'absolute ownership.'" *State v. Tyler*, 149 Ariz. 312, 316, 718 P.2d 214, 218 (App. 1986)

(quoting *Webster's Third New International Dictionary (Unabridged)* 496, 672 (1981)). Further, constructive possession need not be exclusive or personal. See *State v. Chabolla-Hinojosa*, 192 Ariz. 360, 365, ¶ 18, 965 P.2d 94, 99 (App. 1998). As our supreme court explained in *State v. Villavicencio*, 108 Ariz. 518, 520, 502 P.2d 1337, 1339 (1972):

Constructive possession is generally applied to those circumstances where the drug is not found on the person of the defendant nor in his presence, but is found in a place under his dominion and control and under circumstances from which it can be reasonably inferred that the defendant had actual knowledge of the existence of the narcotics. Exclusive control of the place in which the narcotics are found is not necessary.

¶19 The circumstantial evidence here is sufficient to establish Felix-Ruiz's constructive possession of the methamphetamine and paraphernalia. The illicit items were in a locked shed next to the home in which he lived as one of the adult heads of the household. Mail addressed to him was found in the shed. Significantly, the shed was outfitted with a video surveillance system - including a camera visible on the outside of the shed - which an officer testified drug dealers typically use to protect their inventory from law enforcement or potential thieves. Considering these circumstances in the light most favorable to sustaining the verdicts, a reasonable juror could conclude Felix-Ruiz knew about the drugs and paraphernalia in

the shed and that items in the shed were under his dominion and control.

¶10 Notwithstanding Felix-Ruiz's argument to the contrary, whatever access other family members may have had to the shed does not eliminate his culpability. Accordingly, sufficient evidence supports his convictions. See *Villavicencio*, 108 Ariz. at 519-20, 502 P.2d at 1338-39 (defendant constructively possessed narcotics found in a cardboard box located on a porch accessible to others).

B. Jury Instructions.

¶11 Felix-Ruiz also argues the superior court erred by failing to instruct the jury that he had a constitutional right not to testify. We agree with Felix-Ruiz that when a criminal defendant exercises his or her right not to testify, the superior court errs if it does not instruct the jury that the defendant has a constitutional right not to testify. However, considering the instructions the court gave here as a whole, we cannot conclude that the court's failure to give that instruction in this case requires reversal of Felix-Ruiz's convictions.

¶12 We review jury instructions as a whole to determine if they accurately reflect the law. *State v. Hoskins*, 199 Ariz. 127, 145, ¶ 75, 14 P.3d 997, 1015 (2000). We will not reverse a jury verdict because of an erroneous instruction unless the

instructions taken together could reasonably mislead a jury. See *State v. Gallegos*, 178 Ariz. 1, 10, 870 P.2d 1097, 1106 (1994); see also *State v. Norgard*, 103 Ariz. 381, 383, 442 P.2d 544, 546 (1968) ("Instructions must be considered as a whole, and no case will be reversed because of some isolated paragraph or portion of an instruction which, standing alone, might be misleading.").

¶13 Here, although the superior court did not specifically instruct the jury at the close of trial that Felix-Ruiz had a constitutional right to not testify at trial and that the jury should not consider his exercise of that right in determining his guilt, the court did give the following closing instructions:

Evidence means the testimony of witnesses and the exhibits introduced in court. . . . The State must prove guilt beyond a reasonable doubt based on the evidence. The defendant is not required to produce evidence of any kind. The decision on whether to produce any evidence is left to the defendant, acting with the advice of an attorney. The defendant's decision not to produce any evidence is not evidence of guilt. . . . [T]he defendant is presumed by law to be innocent

Moreover, although the court did not include the required instruction among the closing instructions, during *voir dire* it informed the jury venire of a defendant's right not to testify. At that time, the court told the venire, "[A] [d]efendant in a

criminal case has the right not to testify at trial. The exercise of this right cannot be considered by the jury in determining guilt or innocence." The court then asked, "Is there anyone [in the venire] who does not understand the principles of law I have just stated?" None of the jurors responded. We also note that during closing arguments, the State did not assert that Felix-Ruiz's refusal to testify was evidence of his guilt.

¶14 Notwithstanding that the superior court erred in failing to instruct the jury that Felix-Ruiz had a constitutional right to not testify and that it could not consider his decision to exercise that right in deciding whether he was guilty, the court properly instructed the jury on the presumption of innocence and that the State had the burden to establish guilt beyond a reasonable doubt. For all of these reasons, considered as a whole, the court's instructions, its statements during *voir dire* and the inferences therefrom, accurately reflected the applicable law and did not mislead the jury.

CONCLUSION

¶15 Sufficient evidence supports Felix-Ruiz's convictions. Moreover, the superior court's erroneous failure to instruct the jury that Felix-Ruiz had a constitutional right to not testify and that it could not consider his exercise of that right in

deciding whether to convict him does not require reversal of his convictions. We affirm the convictions and the resulting sentences.

_____/s/_____
DIANE M. JOHNSEN, Judge

CONCURRING:

_____/s/_____
SAMUEL A. THUMMA, Presiding Judge

_____/s/_____
MICHAEL J. BROWN, Judge