DIVISION ONE
FILED: 2/21/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	No. 1 CA-CR 12-0194
	)	DEPARTMENT D
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
LAWRENCE L TYCE,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2005-118421-001

The Honorable Sally Schneider Duncan, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Division
And Alice Jones, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Paul J. Prato, Deputy Public Defender
Attorneys for Appellant

G E M M I L L, Judge

¶1 Defendant Lawrence L. Tyce appeals his convictions and sentences for possession of marijuana for sale and transportation of marijuana for sale, both class two felonies,

and possession of drug paraphernalia, a class six felony. Tyce challenges the sufficiency of the evidence and an incomplete jury instruction. For the reasons that follow, we affirm.

¶2 Tyce was charged, as a principal or an accomplice, with knowingly possessing marijuana for sale and knowingly transporting marijuana for sale. *See* A.R.S. § 13-3405(A)(2),(4) (Supp. 2012); A.R.S. § 13-303(A)(3) (2010).[1] He was also charged, as a principal or an accomplice, with using, or possessing with intent to use, "pre[-]manufactured can lids, cans, labels, styrofoam and filling, gift-wrap, drug paraphernalia, to pack, repack, store, contain or conceal marijuana." *See* A.R.S. § 13-3415(A), (F)(2) (2010); A.R.S. § 13-303(A)(3). Anthony Davis and Marcia Williams were also charged with the same offenses; Williams' trial was severed and Davis was tried with Tyce. Tyce failed to appear for trial, and was tried and convicted in absentia. Tyce was represented by counsel throughout the trial. Following Tyce's arrest in 2011 on a bench warrant, he was sentenced to concurrent prison terms, the longest of which was a flat four years.

¶3 Tyce argues first that the evidence was insufficient to prove that he knowingly or intentionally participated in the offenses for which he was convicted. We revie*w de novo* the

[1] We cite to the current version of the statutes because none were amended in material part after these offenses were committed.

sufficiency of the evidence to support a conviction. *State v. West*, 226 Ariz. 559, 562, ¶ 15, 250 P.3d 1188, 1191 (2011) (citation omitted).

¶4 In reviewing the sufficiency of the evidence, we view the facts in the light most favorable to upholding the jury's verdict and resolve all conflicts in the evidence against defendant. *State v. Girdler*, 138 Ariz. 482, 488, 675 P.2d 1301, 1307 (1983). Possession can be actual or constructive; "[c]onstructive possession can be established by showing that the accused exercised dominion and control over the drug itself, or the location in which the substance was found." *State v. Teagle*, 217 Ariz. 17, 27, ¶ 41, 170 P.3d 266, 276 (App. 2007). The state may premise "a defendant's criminal liability for a substantive criminal offense on an accomplice theory if the state is able to show the defendant aided or facilitated the commission of that offense by a principal." *State v. King*, 226 Ariz. 253, 258, ¶ 16, 245 P.3d 938, 943 (App. 2011) (internal quotation marks omitted). We do not distinguish between direct and circumstantial evidence. *See State v. Stuard,* 176 Ariz. 589, 603, 863 P.2d 881, 895 (1993). "To set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987).

¶5 In this case, we conclude that the circumstantial evidence was sufficient to support Tyce's convictions for the charged offenses. The investigation began when a police officer stationed at a FedEx center in Tempe obtained a search warrant to open a suspicious package addressed to a residence in south Phoenix. In the package the officer found four cartons of cigarettes and nearly forty paint can lids.

¶6 Tempe Police proceeded to conduct surveillance on the south Phoenix residence that they later learned was rented to Tyce. The officers observed Tyce, at about 10:15 a.m., walk from the house to the sidewalk, look both ways down the street, and return to the residence. Shortly thereafter, they observed a Toyota enter the garage and then leave within five minutes, driven by a male, with a female passenger.

¶7 Police followed the couple to a shipping center in west Phoenix. The female, subsequently identified as Marcia Williams, dropped off a package at the shipping center. After the couple left the store, police recovered the package from the shipping center. The package was addressed to Herbert Mayes in Newburgh, N.Y. After obtaining a search warrant, the police opened the package and found six paint cans labeled "Plantation Pride Inc. Dried Tomato Paste 100 Percent Tomatoes". Inside each of the six paint cans, police found about two pounds of marijuana, for a total of 12 pounds of marijuana.

¶8 Police subsequently arrested Tyce attempting to pick up the package with the forty paint can lids. The police then executed a search warrant on Tyce's residence, where they found Williams and Davis. In the kitchen pantry, police found a drill press that could be used to press the lids on the paint cans, a duffle bag containing two empty paint cans, one lid, and a cooler containing 15 pounds of marijuana.

¶9 Elsewhere in the residence and in the enclosed garage, police found packing boxes, styrofoam, eight empty paint cans without lids, and products used to mask the odor of marijuana. The lids in the package Tyce had attempted to pick up at the Tempe shipping center matched these cans. Police also found orange tomato paste labels similar to those found on the paint cans in the package dropped off at the shipping center. On the bed of the master bedroom occupied by Tyce, they found a copy of a shipping label addressed to Herbert Mayes in Newburgh, N.Y., dated two weeks earlier and with a different sender than the one on the package dropped off for shipment earlier that day. In Tyce's computer bag, they found a piece of paper with Mayes' name and address on it.

¶10 Tyce admitted to police that he knew the package he was attempting to pick up contained "tin lids," and he knew about the drug activity going on at the house, but he denied any involvement in it. Tyce said he was just in town for a week to

visit his girlfriend and to gamble. The evidence showed, however, that Tyce was the person who had been leasing the house for the past four or five months. Receipts in Tyce's vehicle and at the house, including two for the purchase of furniture, also identified Tyce as residing at this address.

¶11 The evidence shows that Tyce leased and lived in the house in which police found 15 pounds of marijuana, a drill press, packaging, and odor-masking material. Given the physical evidence and the fact that Tyce admitted to police that he knew about the drug activity going on in the house, a reasonable jury could have found that Tyce knowingly possessed both the drug paraphernalia and the marijuana for sale. In light of his control over the house in which marijuana was packaged for shipment, and the paperwork linking him to the package of 12 pounds of marijuana addressed to the person from Newburgh, N.Y., a reasonable jury could also have found that Tyce was an accomplice to the transportation of marijuana for sale. In short, we find evidence sufficient to prove Tyce had the requisite *mens rea* for the offenses for which he was convicted.

¶12 Tyce also argues that the judge fundamentally erred in defining drug paraphernalia, and that the evidence was insufficient to convict him of the crime of possession of drug paraphernalia as defined by the judge. The judge appropriately instructed the jury that possession of drug paraphernalia

requires proof that "[t]he defendant used or possessed with intent to use, drug paraphernalia to pack, repack, store, contain and/or conceal marijuana." Without objection, however, the judge defined drug paraphernalia in the terms requested by the State (presumably inadvertently) to mean "all equipment, products and materials of any kind which are used, intended for use or designed for use in *testing analyzing* marijuana." (Emphasis added.) Although the statutory definition of drug paraphernalia does encompass items used to test or analyze drugs, *see* A.R.S. 13-3415(F)(2), no evidence was offered in this case to suggest that the items possessed by defendant were designed to test or analyze marijuana. Rather, the State charged Tyce only with possessing items used to package, store, and conceal marijuana, and only offered evidence to support his possession of this type of drug paraphernalia. The jury instruction, therefore, was incomplete and not consistent with the actual facts.

¶13 Relying on the imcomplete wording of the jury instruction ("testing analyzing"), Tyce argues that the evidence was insufficient to convict him of this offense because there was no evidence that the cans, can lids, styrofoam, and other materials used to package the marijuana were used to test or analyze the marijuana. In reviewing the sufficiency of the evidence, however, we determine whether substantial evidence was

offered to convict defendant of the charged crime. *See State v. Cox*, 217 Ariz. 353, 357, ¶ 22, 174 P.3d 265, 269 (2007) ("[T]he relevant question is whether, after 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.") (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

¶14 In this case, the evidence was more than sufficient to convict Tyce of the charged offense of possession of drug paraphernalia. The judge properly instructed that the offense required proof that the defendant possessed the paraphernalia with intent to use it "to pack, repack, store, contain and/or conceal marijuana." Tyce did not dispute during trial that the paint can lids, the paint cans, the styrofoam, and the other wrapping materials found at the residence were in fact "drug paraphernalia." He conceded that the "drug paraphernalia" at issue included the paint can lids in the package he attempted to retrieve from the FedEx center, and by implication, the paint cans themselves found at the residence. He argued only that the State had failed to prove that he possessed those items with the intent to use them to package marijuana. On this record, we find that the incomplete definition of "drug paraphernalia" does not require us to vacate Tyce's conviction for this offense.

¶15 Tyce argues on a similar point that the judge fundamentally erred in instructing the jury on a definition of drug paraphernalia that had no relationship to the charge or the evidence. Because Tyce failed to object at trial, we review for fundamental error only. *See State v. Henderson,* 210 Ariz. 561, 568, ¶ 22, 115 P.3d 601, 608 (2005). Tyce accordingly bears the burden of establishing error, that the error was fundamental, and that the error caused him prejudice. *Henderson,* 210 Ariz. at 568, ¶¶ 23, 26, 115 P.3d at 608.

¶16 The State concedes that the definition was given in error, and we agree. Tyce has failed, however, to demonstrate that the error was fundamental or prejudicial, as necessary for reversal on this basis. Error is fundamental when it goes to the foundation of defendant's case, takes from him a right essential to his defense, and is error of such magnitude that he could not possibly have received a fair trial. *Henderson,* 210 Ariz. at 567, ¶ 19, 115 P.3d at 607. Because Tyce did not dispute at trial that the items at issue were drug paraphernalia, he cannot show that the error was fundamental.

¶17 Nor can Tyce demonstrate the requisite prejudice. To prove prejudice, Tyce must show that a reasonable jury, given the correct instruction, could have reached a different result. *Henderson,* 210 Ariz. at 569, ¶ 27, 115 P.3d at 609. Again, Tyce conceded that the "drug paraphernalia" at issue included the

paint can lids in the package he attempted to retrieve from the FedEx center, and by implication, the paint cans themselves found at the residence. Tyce defended this charge solely on the basis that he had no interest in or intent to use the items to package marijuana. Under these circumstances, Tyce has failed to meet his burden to demonstrate that had the jury been properly instructed on the definition of drug paraphernalia, a reasonable jury could have acquitted him. Because Tyce has failed to prove that the error was either fundamental or prejudicial, he has failed to meet his burden to reverse on this basis.

¶18 For the foregoing reasons, we affirm Tyce's convictions and sentences.

/s/
_____
JOHN C. GEMMILL, Presiding Judge

CONCURRING:

/s/
_____
JON W. THOMPSON, Judge

/s/
_____
DONN KESSLER, Judge