

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

BENJAMIN JOHN SPINELLI, JR., *Appellant*.

No. 1 CA-CR 17-0397
FILED 8-14-2018

Appeal from the Superior Court in Maricopa County
No. CR2016-103305-001
The Honorable George H. Foster, Jr., Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Michelle L. Hogan
Counsel for Appellee

The Stavris Law Firm PLLC, Scottsdale
By Christopher Stavris
Counsel for Appellant

MEMORANDUM DECISION

Chief Judge Samuel A. Thumma delivered the decision of the Court, in which Judge James P. Beene and Judge James B. Morse Jr. joined.

T H U M M A, Chief Judge:

¶1 Benjamin Spinelli, Jr., appeals his convictions and resulting sentences for possession of dangerous drugs, possession of marijuana, possession of drug paraphernalia and criminal trespass in the first degree. For the following reasons, his convictions and resulting sentences are affirmed.

FACTS¹ AND PROCEDURAL HISTORY

¶2 In January 2016, Phoenix Police Detective R.S. received a complaint that Spinelli and P.S. had trespassed a vacant residential property and remained inside. The following morning, Detective R.S., accompanied by three other law enforcement officers, drove to the property to investigate.

¶3 Although several windows were “boarded up,” the officers found an open window and climbed into the residence. Once inside, the officers conducted a protective sweep and secured the premises. While Detective R.S. entered a bedroom and found P.S. lying in bed, Detective M.M. located Spinelli in a bathroom, and the other officers discovered a second woman in the living room.

¶4 After the officers placed Spinelli and the two women in handcuffs and inside separate patrol vehicles, they searched the property. During the search, the officers discovered contraband in the bedroom where Detective R.S. had found P.S., both in the bed (a syringe) and beside the bed (an uncapped syringe, a pipe, and a “complete kit” inside an eyeglass case - consisting of a spoon, a “loaded” syringe, and three baggies, later determined to contain methamphetamine (1 baggie) and marijuana (2

¹ This court views the facts in the light most favorable to sustaining the verdicts and resolves all reasonable inferences against the defendant. *State v. Harm*, 236 Ariz. 402, 404 n.2 (App. 2015).

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baggies)). Near the eyeglass case, officers found a wallet containing Spinelli's driver's license, social security card and other personal, identifying information. Officers also discovered a weapon above the bed, comprised of an axe handle and a "huge spike."

¶5 The State charged Spinelli with one count of possession or use of dangerous drugs; two counts of possession of drug paraphernalia; one count of possession or use of marijuana and one count of criminal trespass in the first degree.² The State alleged aggravating circumstances and that Spinelli had historical prior felony convictions.

¶6 At trial, a manager of the property testified that it is a residential, single-family home. He further testified that neither Spinelli nor the two women had permission to be on the property. After the State rested in its case in chief, Spinelli unsuccessfully moved for a judgment of acquittal. *See* Ariz. R. Crim. P. 20(a) (2018).³ After final instructions and argument, the jury deliberated and found Spinelli guilty as charged. The found Spinelli had multiple prior historical felony convictions and sentenced him to a mitigated term of 7 years' imprisonment on the possession or use of dangerous drugs conviction and to concurrent, mitigated terms of 2.5 years' imprisonment on the remaining convictions.

¶7 This court has jurisdiction over Spinelli'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), 13-4031 and 13-4033(A).

DISCUSSION

I. Spinelli Has Not Shown That Trial Testimony Regarding Other Acts Resulted In Reversible Error.

¶8 Spinelli contends the superior court erred by failing to sua sponte declare a mistrial after a testifying detective referred to his previous contacts with Spinelli and Spinelli's prior drug use during cross-examination. Because Spinelli failed to make a timely objection at trial, review on appeal is limited to fundamental error. *See* Ariz. R. Crim. P. 21.3(c); *State v. Henderson*, 210 Ariz. 561, 567 ¶¶ 19-20 (2005). "Accordingly, [Spinelli] 'bears the burden to establish that (1) error exists, (2) the error is

² On the State's motion, the superior court dismissed a misconduct involving weapons count without prejudice.

³ Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

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fundamental, and (3) the error caused him prejudice.” *State v. James*, 231 Ariz. 490, 493 ¶ 11 (App. 2013) (citations omitted). “Fundamental error is limited to those rare cases that involve error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.” *State v. Valverde*, 220 Ariz. 582, 585 ¶ 12 (2009) (internal quotation omitted).

¶9 The State’s first witness, Detective M.M., testified that his primary role in the investigation was taking Spinelli into custody. On cross-examination, defense counsel asked Detective M.M. whether he had contact with Spinelli before the January 2016 contact. After the detective answered, “[a]bsolutely,” defense counsel asked whether the detective had threatened Spinelli by suggesting he would be targeted in prison, which Detective M.M. denied.

¶10 The State then called Detective R.S., who was asked on direct examination and without objection, whether he knew P.S. Detective R.S. answered that he knew P.S. through “many [previous] contacts.” Detective R.S. explained that he was anxious to locate Spinelli on the property once he found P.S. because he knew, through “many contacts,” that they are always together. Without objection, Detective R.S. then testified that based on these prior contacts, he recognized that: (1) the furnishings in the property’s bedroom belonged to P.S. and Spinelli, and (2) the wallet positioned next to the contraband belonged to Spinelli.

¶11 On cross-examination, defense counsel asked Detective R.S. whether he checked Spinelli for “track marks” or other physical signs of drug use, and the detective answered, “I had no need. I’m already very aware of his drug use.” Defense counsel moved to strike, which the superior court sustained and struck the comment. Nonetheless, defense counsel then asked Detective R.S. whether he did not physically check Spinelli because he had “a lot of experience” with Spinelli and therefore knew of his drug use. The detective responded, “You said that, sir. I did not.” Throughout the remaining cross-examination, defense counsel repeatedly referred to the detective’s prior contacts with Spinelli and elicited testimony that, through those contacts, the detective was “aware” of Spinelli’s long-term drug use.

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¶12 On appeal, the State argues Spinelli’s arguments are barred by the invited error doctrine, which “precludes a party who causes or initiates an error from profiting from the error on appeal.” *State v. Lucero*, 223 Ariz. 129, 135 ¶ 17 (App. 2009). “Because the invited error doctrine prevents the court from correcting error that might go to the foundation of a fair trial and causes prejudice to the defendant, extreme caution must be exercised in permitting an application of the doctrine unless the facts clearly show that the error was actually invited by the complaining party.” *Id.* at ¶ 18 (internal quotations omitted). Thus, the invited error doctrine does not foreclose relief unless the complaining party affirmatively invited the error, rather than passively acquiesced to it. *Id.* at 136 ¶ 19.

¶13 Contrary to Spinelli’s assertions, the challenged testimony was not “unsolicited.” Indeed, the record reflects that immediately upon commencing cross-examination of the State’s first witness, defense counsel asked whether the detective had prior contacts with Spinelli, placing Spinelli’s repeated encounters with police officers directly before the jury. Although the prosecutor subsequently elicited testimony that Detective R.S. likewise had multiple prior contacts with Spinelli, this testimony simply confirmed Detective M.M.’s testimony that Spinelli had a history of police contact. Furthermore, defense counsel elicited testimony regarding Spinelli’s prior drug use by asking Detective R.S. why he did not check Spinelli for physical marks of drug abuse. Although the superior court struck the detective’s response, defense counsel then incorporated the stricken answer into his next question and asked additional questions eliciting the detective’s testimony that he was aware of Spinelli’s drug use through prior contacts. Because the record shows the detectives responsively answered defense counsel’s questions, and because the record reflects that defense counsel was “the first party to elicit the [prejudicial] testimony,” Spinelli is “barred from raising the error on appeal.” *Id.* at 136-38 ¶¶ 20, 31.

¶14 Apart from invited error, Spinelli has failed to demonstrate any fundamental error resulting in prejudice. The State presented uncontested evidence that the contraband was found in a bedroom that Spinelli shared with P.S., immediately next to his wallet. *See State v. Escalante*, 242 Ariz. 375, 385 ¶ 45 (App. 2017) (concluding defendant could not establish prejudice from the State’s use of inadmissible evidence, given his failure to object and other trial evidence supporting his convictions). Given this substantial evidence of Spinelli’s guilt, the superior court did not err, much less commit fundamental prejudicial error, by failing to sua sponte declare a mistrial.

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II. Spinelli Has Not Shown The Superior Court Erred In Denying His Motion For Judgment Of Acquittal.

¶15 Spinelli contends the superior court improperly denied his motion for judgment of acquittal. Specifically, he argues the State failed to prove the requisite element of possession for any of the drug-related offenses. This court reviews de novo a ruling on a Rule 20 motion. *State v. West*, 226 Ariz. 559, 562 ¶ 15 (2011). “[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.” *Id.* at 562 ¶ 16 (internal quotation omitted). Sufficient evidence upon which a reasonable jury can convict may be direct or circumstantial. *Id.* A judgment of acquittal is appropriate only when “there is no substantial evidence to support a conviction.” Ariz. R. Crim. P. 20(a). In reviewing the sufficiency of the evidence, this court does not reweigh conflicting evidence or reassess witness credibility. *See State v. Buccheri-Bianca*, 233 Ariz. 324, 334 ¶ 38 (App. 2013).

¶16 As proscribed by statute, a person may not knowingly possess: (1) a dangerous drug, A.R.S. § 13-3407(A)(1), or (2) marijuana, A.R.S. § 13-3405(A)(1). “It is unlawful for any person” to “possess with intent to use” any material intended to “introduce into the human body” a prohibited drug. A.R.S. § 13-3415(A), (F)(2). “Possession may be actual or constructive.” *State v. Gonsalves*, 231 Ariz. 521, 523 ¶ 9 (App. 2013); *see also* A.R.S. § 13-105(34) (“Possess means knowingly to have physical possession or otherwise to exercise dominion or control over property.”). Thus, the State may prove possession by showing a defendant exercised either “direct physical control” or “dominion or control” over contraband. *See Gonsalves*, 231 Ariz. at 523 ¶ 9. Because a person may exercise dominion or control over property that is not in his or her physical possession, “under a theory of constructive possession, two or more persons may jointly possess a prohibited object; possession need not be [e]xclusive, immediate and personal.” *Id.* (internal quotation omitted).

¶17 At trial, the State argued that Spinelli had constructive possession over the contraband. As support for this theory, the State presented evidence that the wallet containing Spinelli’s personal, identifying information was found immediately next to the pipe and drug kit, which contained a spoon, a loaded syringe and baggies of methamphetamine and marijuana. Detective R.S. testified that he recognized the wallet as belonging to Spinelli, and recounted that P.S. said she shared the bedroom with him. On this record, there was sufficient evidence from which a reasonable jury could find Spinelli knowingly and

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constructively possessed all of the contraband. *See State v. Cox*, 214 Ariz. 518, 520 ¶ 10 (App. 2007) (“Constructive possession exists when the prohibited property is found in a place under [the defendant’s] dominion [or] control and under circumstances from which it can be reasonably inferred that the defendant had actual knowledge of the existence of the [property].”) (internal quotations omitted). Therefore, the superior court did not err by denying Spinelli’s motion for judgment of acquittal.

III. Spinelli’s Supplemental Pro Se Brief Does Not Show Reversible Error.

¶18 After filing a “Motion to Notify of Intent to file a Supplemental Brief,” which is deemed granted, Spinelli filed a supplemental pro se brief. To the extent the pro se brief raises issues addressed above, it fails for those same reasons. To the extent the pro se brief raises ineffective assistance of counsel issues, those issues are not properly raised in this direct appeal. *See Ariz. R. Crim. P. 32*. Finally, to the extent the pro se brief asserts any other argument, it fails to show reversible error or fundamental error resulting in prejudice. *See James*, 231 Ariz. at 493 ¶ 11.

CONCLUSION

¶19 Spinelli’s convictions and resulting sentences are affirmed.



AMY M. WOOD • Clerk of the Court
FILED: AA