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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
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BY: GH

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) 1 CA-CR 09-0312  
)  
Appellee, ) DEPARTMENT B  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
) Rule 111, Rules of the  
GARY WAYNE NIETZKE, ) Arizona Supreme Court)  
)  
Appellant. )  
)

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Appeal from the Superior Court in Mohave County

Cause No. CR-2008-0036

The Honorable Steven F. Conn, Judge

**AFFIRMED**

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Terry Goddard, Attorney General Phoenix  
By Kent E. Cattani, Chief Counsel  
Joseph Maziarz  
Criminal Appeals/Capital Litigation Section  
Attorneys for Appellee

Mohave County Public Defender's Office Kingman  
By Jill L. Evans, Mohave County Appellate Defender  
Attorneys for Appellant

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**G E M M I L L**, Presiding Judge

¶1 Appellant Gary Wayne Nietzke appeals his convictions  
and sentences for possession of dangerous drugs for sale, a

class two felony, and possession of drug paraphernalia, a class six felony. For the following reasons, we affirm.

#### FACTS AND PROCEDURAL BACKGROUND

¶2 When reviewing the record, "we view the evidence in the light most favorable to supporting the verdict." *State v. Torres-Soto*, 187 Ariz. 144, 145, 927 P.2d 804, 805 (App. 1996). On August 20, 2007, several Kingman Police Department officers gathered outside Nietzsche's home to execute a search warrant. As they prepared to enter the home, Nietzsche drove up in his pickup truck. One officer stayed outside with Nietzsche while the others went inside. They were met at the door by Nietzsche's grandson, who was five or six years old, and Nietzsche's daughter was also inside.

¶3 After the officers secured the home, Kingman Police Sergeant T went outside to interview Nietzsche. Sergeant T apprised him of his *Miranda*<sup>1</sup> rights and then asked if he knew why the police were at his home. Nietzsche said "he knew [the police] were coming" because they had been "making meth busts around town and he felt that he'd be the next one because he was dealing methamphetamine." He told Sergeant T he was a "delivery boy," explaining he would send money through Western Union to someone in Phoenix, drive to Phoenix to pick up the drugs, and deliver the drugs to a third-party in Kingman. Nietzsche received

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<sup>1</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

gas money, two hundred dollars cash, or an amount of methamphetamine in return for his services.

¶14 Nietzsche directed the police to where drugs were hidden in the home. The police recovered a plastic baggy containing 0.67 grams of methamphetamine, a paper bindle containing 0.048 grams of methamphetamine, a plastic baggie with a white powder residue inside, empty plastic baggies, a digital scale, and a syringe from the hallway closet. In various other locations throughout the house they also found a spoon holding 0.14 grams of methamphetamine, a glass pipe used for smoking methamphetamine that had residue on it, and a couple of broken syringes.

¶15 Nietzsche was charged with possession of drug paraphernalia (Count One), possession of dangerous drugs (Count Two), and possession of dangerous drugs for sale (Count Three). After a one-day trial, a jury found Nietzsche guilty of all three counts. The trial court later dismissed Count Two, finding it merged with Count Three. Nietzsche was sentenced to mitigated, concurrent terms of six months' imprisonment for Count One and six years' imprisonment for Count Three. Nietzsche timely appealed, and we have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031, and -4033(A)(1) (2010).

## ANALYSIS

¶16 Nietzsche contends that the State presented insufficient evidence that he possessed any drugs for the purpose of sale and that the trial court should have granted his motion for judgment of acquittal on Count Three. We disagree and find there was sufficient evidence to support the conviction.

¶17 A judgment of acquittal is appropriate only if there is "no substantial evidence to warrant a conviction." *State v. Landrigan*, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993) (quoting *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990)). "Substantial evidence is more than a mere scintilla and is such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *Landrigan*, 176 Ariz. at 4, 859 P.2d at 114 (citations omitted). The evidence may be direct or circumstantial, "but if reasonable minds can differ on inferences to be drawn therefrom, the case must be submitted to the jury." *Id.*

¶18 Nietzsche argues the evidence did not establish that he intended to sell the methamphetamine found in his home rather than use the drugs himself, as the State was required to prove to convict him of possession of dangerous drugs for sale under A.R.S. § 13-3407(A)(2). See *State v. Arce*, 107 Ariz. 156, 160, 483 P.2d 1395, 1399 (1971) (to convict of possession of drugs

for sale prosecution "must also show that the possession was for the purpose of sale"). Nietzsche points out that the methamphetamine found in the closet was in a small baggie and a paper bindle and was not pre-packaged for sale and that he admitted to police he had used methamphetamine for twenty-five years, and he suggests the small amount of methamphetamine indicates it was intended for personal use rather than sale.

¶9 There was sufficient evidence, however, from which the jury could infer that Nietzsche possessed drugs for sale rather than personal use. The police recovered 0.718 grams (0.67 plus 0.048 grams) of methamphetamine from the hallway closet in Nietzsche's home. In the same closet, the police found a scale and empty plastic baggies. A police officer testified that the scale was used for weighing methamphetamine to prepackage it for sale. He stated that the plastic baggies, "in conjunction with the digital scale [indicate] that this is exactly what this is for . . . to weigh and then to sell later."

¶10 Regarding the amount of methamphetamine, two officers testified at trial that the amount was sufficiently large that it could be divided for sale. One officer testified: "[I]f you take one gram and cut it up in tenths . . . take one tenth of that and then cut it up in tenths and then . . . half of that would . . . be [a] usable quality (sic)." And Nietzsche told officers that he would often trade methamphetamine for goods,

such as electronics and tools. See A.R.S. § 13-3401 (“‘Sale’ or ‘sell’ means an exchange for anything of value or advantage.”).

¶11 In his opening brief, Nietzke asserts he told police that, after his most recent trip to Phoenix to pick up methamphetamine, he had kept approximately 0.75 grams of methamphetamine “for personal use.” He argues this amount matches the amount found in the hallway closet and suggests the jury therefore could not have reasonably found he possessed the methamphetamine for sale rather than personal use.

¶12 We disagree. First, we have not found where in the record Nietzke said he kept the 0.75 grams for personal use. Nietzke told an officer he would sometimes keep some methamphetamine for personal use as payment for his delivery services. Regarding the .75 grams of methamphetamine from his most recent trip to Phoenix, however, Nietzke told a police officer that “he took some of the meth out to the swap meet on Thompson where he left some of it out there and then he said he came back to his residence probably with about, oh, three-quarters of a gram of meth.” He did not specifically say the methamphetamine was for his personal use.

¶13 Second, even if we assume Nietzke made such statements to the police, the jury as the finder of fact had to weigh the evidence and determine the credibility of witnesses. See *State v. Fimbres*, 222 Ariz. 293, 297, ¶ 4, 213 P.3d 1020, 1024 (App.

2009). The jury was free to rely on the officers' testimony over Nietzsche's self-serving statements in reaching the verdict.

**CONCLUSION**

¶14 For the foregoing reasons, Nietzsche's convictions and sentences are affirmed.

\_\_\_\_\_/s/\_\_\_\_\_  
JOHN C. GEMMILL, Presiding Judge

CONCURRING:

\_\_\_\_\_/s/\_\_\_\_\_  
PATRICIA K. NORRIS, Judge

\_\_\_\_\_/s/\_\_\_\_\_  
MAURICE PORTLEY, Judge