DIVISION ONE
FILED: 09/20/2011
RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. ANGELA ELAINE FARMER, Appellant.	)	No. 1 CA-CR 10-0539
	)	DEPARTMENT B
	)	**MEMORANDUM DECISION** (Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Mohave County

Cause No. CR2008-1169

The Honorable Derek C. Carlisle, Judge Pro Tempore

VACATED AND REMANDED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
And Barbara A. Bailey, Assistant Attorney General
Attorneys for Appellee

Jill L. Evans, Mohave County Appellate Defender — Kingman
Attorney for Appellant

S W A N N, Judge

¶1 Angela Elaine Farmer ("Defendant") appeals her conviction by a jury for Transportation of Dangerous Drugs for Sale, a class 2 felony, and Possession of Drug Paraphernalia

(Methamphetamine), a class 6 felony. We conclude that the state failed to present evidence from which a reasonable jury could properly find each element of the charged offenses beyond a reasonable doubt. The trial court therefore should have granted Defendant's Rule 20 motion at the conclusion of the state's case. We now vacate the convictions for lack of evidence.

FACTS AND PROCEDURAL HISTORY[1]

¶2 On January 31, 2008, Detective Donald Grasse of the Bullhead City Police learned that Harry Graham was going to Barstow, California, that day "to pick up a rather large supply of methamphetamine." He learned that Graham would be driving a white Ford Thunderbird and that Defendant would be accompanying him. Grasse set up an investigation based on that information.

¶3 Using an unmarked car, Bullhead City Police Corporal Ken Williams set up surveillance of the trailer park where Graham and Defendant lived. He first spotted Graham's Thunderbird as it left the trailer park at around 3 p.m. with two occupants, a man and a woman. He followed the Thunderbird to a gas station, where it stopped for gas before heading off towards Interstate 40, and discontinued his surveillance before the Thunderbird

[1] We view the facts in the light most favorable to upholding the verdict. *State v. Gallegos*, 178 Ariz. 1, 9, 870 P.2d 1097, 1105 (1994).

reached the interstate. At trial Williams could not remember who was driving the car.

¶4 Detective John Johnson of the Lake Havasu City Police Department and two other Lake Havasu officers -- each in separate cars -- began surveillance of the Thunderbird after it reached Interstate 40, using a "leap-frog" strategy in order to avoid suspicion. Johnson, while in front of the Thunderbird, took the exit in Ludlow, California, so that it would "not be suspicious in case the [Thunderbird] did exit there." At trial he did not recall who was driving the Thunderbird. He parked in the Dairy Queen parking lot and observed the Thunderbird enter and park in the same lot shortly thereafter. The male and female occupants of the Thunderbird got out, milled around for a few minutes, entered the Dairy Queen, came back out shortly thereafter and then stood in a nearby picnic area for a while. They were still in the picnic area when Johnson, seeking to avoid detection, left the lot and drove toward a gas station on the other side of the interstate. As he drove under the interstate, he saw "two Hispanic male subjects . . . come off the freeway from which would be the State of California [sic] . . . heading towards the Dairy Queen." Once at the gas station, Johnson could no longer see the Dairy Queen parking lot.

¶5 Detective Brian Madsen of the Lake Havasu City Police Department was one of the officers with Johnson following the Thunderbird on Interstate 40. He arrived in Ludlow after Johnson, and parked in a dirt lot across the access road from the Dairy Queen because he did not want to "spook" the people he was following. From there, he could see the Thunderbird and that the male and female occupants of the vehicle were sitting inside it, but he was not close enough to identify them. Another car pulled up next to the Thunderbird. The male in the Thunderbird and a male from the newly arrived car got out and met with each other, standing close enough to make an exchange. The two men "did something," but Madsen "couldn't see what" because of the distance, so Madsen did not see anything change hands. The men then returned to their cars and left "[p]retty much immediately." During this time, Madsen observed the female "not exiting the vehicle and not being involved in what the two males were doing."

¶6 The Lake Havasu City surveillance team then resumed their surveillance of the Thunderbird. The Thunderbird did not return the way it came, as the police expected, but instead returned by a back road to Bullhead City. The surveillance team followed the car until it was stopped, but did not participate in the stop.

¶7 Around 7:10 p.m., Detective Jeff Viles of the Bullhead City Police Department was asked to make a traffic stop of a white Thunderbird. He began following the Thunderbird when it entered Bullhead City and stopped it when they reached a safe and convenient place. He talked to Graham -- who identified himself with an Arizona ID card instead of a driver's license -- and told him that the police had been following him and knew he was transporting drugs. Viles then removed Graham and Defendant, whom he identified as a passenger, from the Thunderbird. He subsequently observed the canine search of the Thunderbird and the removal of a small cooler.

¶8 Officer Eric Clevinger of the Bullhead City Police Department conducted the canine search of the Thunderbird. His dog, Bingo, alerted at both open windows of the car. Clevinger then put Bingo inside the car and gave "him the command again to sniff." Bingo alerted to "a purse on the front floorboard on the passenger side and to an ice chest in the back seat" that had "a male's jacket draped over the top of it." Clevinger returned Bingo to his car and told the detectives that the dog had alerted to those places in the car.

¶9 Williams, the first officer to conduct surveillance of the Thunderbird that day, joined the other officers at the traffic stop. He spoke with Graham and saw Defendant at the stop. While Williams was searching the car, Graham asked him to

get Graham's jacket from the back seat because it was cold and windy. As Williams retrieved the jacket from the driver's side of the back seat, he noticed a "small black Igloo-style ice chest" with "some type of AM-FM stereo system built into the chest itself" beneath the jacket. He picked it up and opened it, but it seemed empty. However, when he shook it, he heard something moving inside. He tried to pull the liner out of the chest, but found he could not.

¶10 Williams then examined the outside of the chest and saw four drywall screws lodged in the bottom. He found a screwdriver in the trunk of the Thunderbird, removed the screws, and then took off the liner. Beneath it he discovered several bags containing what proved to be 334.9 grams of methamphetamine. Graham and Defendant were then arrested and taken to the police station.

¶11 At the station, Grasse and another officer conducted a video-recorded interview of Defendant. After being Mirandized, Defendant told police she was just going for a ride with Graham out to Barstow to pick up parts for one of his trucks. She stated that Graham decided not to go to Barstow after making a phone call. She denied having any knowledge of the methamphetamine that the police found and also denied that she sold the drug, but admitted that she had used the drug in the past. She also admitted that she knew Graham sold drugs, that

she had been his friend for years, and that she had been his "mistress" a few years ago. The police stopped questioning Defendant after she said, "I think I need a lawyer." At trial, the video of the interview was admitted into evidence and shown to the jury.

¶12 After interviewing Defendant, Grasse and the other officer conducted a video-recorded interview of Graham. Graham entered into a plea agreement with the state but died before Defendant's trial began. The state moved to preclude introduction of the plea agreement, and Defendant responded that although the agreement was currently inadmissible, Graham's guilty plea might become admissible during trial, and asked the judge to reserve ruling on the issue. Defendant then moved to admit portions of Graham's interview -- in which he repeatedly declared Defendant "had nothing to do" with the drugs -- as a statement against penal interest. The state opposed admitting the exculpatory portions of the interview, arguing that Graham's statements were not trustworthy. In the alternative, the state argued that if any portion of the interview was to be admitted, then the interview should be admitted in its entirety. After hearing oral argument, the court excluded both the guilty plea and the interview.

¶13 Defendant received a two-day trial before eight jurors. After the state rested, Defendant moved for a directed verdict

of acquittal under Ariz. R. Crim. P. 20. While acknowledging that it did not think this was "the strongest case that the State has ever had," the court found there was "sufficient evidence for this case to go to the jury." The court instructed the jury and included a "mere presence" instruction.

¶14 In closing, the state argued to the jury, "The only real issue you have to decide . . . is whether the defendant knew the purpose of the trip." Defendant responded that the state had not proven that she exercised dominion and control over the drugs, or presented any evidence that she had handled the drugs or the cooler. Defendant contended that she had merely been present during the alleged crimes and that there was no evidence that she knew of the drug deal before arriving in Ludlow.

¶15 In rebuttal, the state argued that "constructive possession is exactly probably [sic] what this case is about" and that Defendant possessed the methamphetamine because it was "on the back seat." The state claimed: "She was at [Graham's] house. They devised a plan. . . . They went to Ludlow, they came back." The state further asserted that the drugs must have been put in the cooler's secret compartment while the car was being driven back from Ludlow and that there was no one in the car other than Defendant who could have done that. The jury found Defendant guilty on both counts.

¶16 At sentencing, the judge found as a mitigating factor that Defendant's participation in the offense was "very minor." The court sentenced her to a mitigated term of five years' imprisonment, flat time, for Transportation of Dangerous Drugs for Sale, a class 2 felony, and to a mitigated term of six months in prison for Possession of Drug Paraphernalia (Methamphetamine), a class 6 felony, sentences to run concurrently. Defendant was given credit for 33 days of presentence incarceration. The court also imposed a $55,200 fine. Defendant timely appeals.[2] We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031 and -4033(A)(1).

DISCUSSION

¶17 We review de novo whether the evidence was sufficient to support the denial of a Rule 20 motion, viewing the evidence in the light most favorable to sustaining the verdict. *State v. Bible,* 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993). "Where there is a complete absence of probative facts to support a conviction, we will reverse a trial court's denial of a Rule 20 motion." *State v. Mathers*, 165 Ariz. 64, 66, 796 P.2d 866, 868 (1990). "The fact that a jury convicts a defendant does not in itself negate the validity of the earlier motion for acquittal," because "a properly instructed jury may occasionally convict

[2] Defendant also filed *pro per* a Notice of Post Conviction Relief, which states "I need a new court appointed lawyer."

even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt. . . .” *Id.* at 67, 796 P.2d at 869 (quoting *Jackson v. Virginia*, 443 U.S. 307, 317 (1979)). A judgment of acquittal is appropriate when there is no evidence that “reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.” *Id.* at 67, 796 P.2d at 869 (quoting *State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980)). Because the state must prove every element of the offense, *State v. Dickens*, 187 Ariz. 1, 18, 926 P.2d 468, 485 (1996), acquittal is appropriate if there is insufficient evidence to support any element.

¶18 Viewing the evidence in the light most favorable to sustaining the verdict, we hold that a reasonable jury could have found the following beyond a reasonable doubt: (1) Graham made the trip intending to obtain drugs, not truck parts; (2) Graham obtained the drugs from the man he met at the Dairy Queen in Ludlow; and (3) at least from the time of the exchange at the Dairy Queen, Defendant knew Graham had obtained drugs.

¶19 We first examine whether there was sufficient evidence that Defendant was an accomplice to the commission of the offenses. It “is particularly true in the context of accomplice liability [that] the potential for juror confusion as to the requirements for imposition of liability is significant and the

consequences to the convicted accomplice are serious." *State v. Noriega*, 187 Ariz. 282, 284, 928 P.2d 706, 708 (App. 1996).

¶20 In *Noriega*, this court discussed the role of "mere presence" because "there exists in collective lay thinking some distorted notions of criminal accountability" from which "a question could arise in the mind of a lay person whether merely being present at the scene of a crime could create some type of criminal liability." *Id.* at 285, 928 P.2d at 709. We recognized that because of the danger that a jury might "convict on behavior which as a matter of law amounts only to mere presence," there needs to be a "stoplight" at the end of the "continuum of behaviors ranging from the more serious acts of the principal to the less objectionable acts of the accomplice." *Id.* at 285-86, 928 P.2d at 709-10. Often in daily life one person's "mere presence" serves as "a significant aid" in another person's undertaking even while "such presence does not rise to the level of 'accomplice.'" *Id*. at 286, 928 P.2d at 710 (providing examples such as "the presence of a parent at a child's school play or the presence of a person at a friend's speaking engagement"). Presence rises to the level of accomplice liability if the state shows "not only that the defendant intended the behavior that is alleged to have aided, abetted, or provided means or opportunity, but also that the

defendant intended that this behavior have the effect of promoting or facilitating the crime being committed." *Id.*

¶21 Accordingly, Defendant was an accomplice only if the state produced sufficient evidence that "with the intent to promote or help in the commission of an offense" she either: "1. Aid[ed], counsel[ed], agree[d] to aid, or attempt[ed] to aid another person in planning or committing the offense; 2. Ask[ed] or command[ed] another person to commit the offense; or 3. Provide[d] the means or an opportunity to another person to commit the offense." *State v. Prasertphong*, 206 Ariz. 70, 90, ¶ 81, 75 P.3d 675, 695 (2003) (*vacated on other grounds by Prasertphong v. Arizona,* 541 U.S. 1039 (2004) (mem.)). Because there is no allegation, much less evidence, that Defendant asked, commanded, or provided a means or opportunity to Graham to commit the offenses, she could have been an accomplice only if she committed "some positive act in aid of the commission of the offense; an active force physical or moral joined with that of the perpetrator . . . ." *State v. Bearden*, 99 Ariz. 1, 3, 405 P.2d 885, 886 (1965).

¶22 Further, for that "act in aid" to produce accomplice liability, "[t]he aider or abettor must stand in the same relation to the crime as the criminal, approach it from the same angle, touch it at the same point and possess criminal intent." *Id.* Even the fact that a defendant was present at the scene of

a crime and "may have known what was happening does not make him guilty of the crime." *State v. Green*, 117 Ariz. 92, 94, 570 P.2d 1265, 1267 (App. 1976), *aff'd in part, modified in part by* 116 Ariz. 587, 570 P.2d 755 (1977).

¶23 In *State v. Miramon*, 27 Ariz. 451, 555 P.2d 1139 (App. 1976), as in this case, the defendant was also a passenger in a vehicle. At the time of his arrest, there was a bag of marijuana tucked a few inches under the passenger seat yet sticking out far enough for the defendant to have been aware of its presence. *Id.* at 452-53. The defendant was also carrying two marijuana cigarettes in his sock. *Id.* at 452. The court found this evidence insufficient as a matter of law to support a conviction for possession of marijuana for sale. *Id.* at 453. The court, noting that the "mere presence of a person where narcotics or marijuana is found is insufficient to establish that the person knowingly possessed or exercised dominion and control over the drugs," held that "[i]n order to convict for possession of marijuana for sale the prosecution must establish not only that the accused had knowledge of the existence of the substance and that it was marijuana but it must also show that the accused exercised dominion and control over the marijuana." *Id.* at 452.

¶24 If the evidence in *Miramon* was insufficient to support a conviction for possession, then *a fortiori* the state's case

against Farmer must fail. Here, there was no evidence of any exercise of dominion and control over the contraband, nor was there any evidence of conduct that facilitated Graham's acquisition, possession or distribution of the substance. Indeed, the only testimony on point was Detective Madsen's acknowledgement that he saw nothing to indicate that Farmer was involved in the transaction between Graham and the other man. Mere proximity to a container does not confer dominion and control over it or its contents.[3] *Cf. State v. Teagle*, 217 Ariz. 17, 27-28, ¶ 41, 179 P.3d 266, 276-77 (2007).

¶25 We also find no evidence in the record to suggest that Defendant helped plan the trip, as the state asserted in its closing argument. There is no evidence that Graham and Defendant met at any time to discuss the purpose of the trip -- the only evidence on the subject was Defendant's own statement that she "was at his house before we left." Though the officers found evidence at Graham's residence to suggest that he was involved in the sale of drugs, Farmer's mere presence at his house cannot, standing alone, support an inference that she was an accomplice in his criminal activities.

[3] The state cites *State v. Villavicenco*, but that case is not on point: Villavicenco argued only that his *admitted* dominion and control over where the drugs were found was not exclusive. 108 Ariz. 518, 520, 502 P.2d 1337, 1339 (1972).

¶26 The state also argues that the evidence supported "a reasonable inference that she assisted" in securing the drugs inside the cooler. But there is no evidence that the drugs were not already secured in the cooler when they were placed in the Thunderbird. There was no evidence that the man who purportedly brought the drugs to Graham had not himself transported them hidden in the cooler. There was no evidence introduced as to what Graham and that man exchanged, and no evidence that Graham brought the cooler to the exchange. Moreover, there was no evidence that Defendant had access during the drive to the tools required to secure or access the secret compartment -- the screwdriver the police used to open the cooler was found in the car's trunk, and the car never stopped between the Dairy Queen parking lot and the traffic stop. On this evidence, the "inference" that the state urges amounts to nothing more than speculation.

¶27 The state also argues that the dog's alert to Defendant's purse supports an inference that Defendant handled drugs in the car. However, the evidence showed that drug-sniffing dogs can detect the lingering odor of methamphetamine for a substantial period of time after the drug is removed. At most, this evidence supports an inference that Defendant had possessed methamphetamine at some time, not that she possessed the methamphetamine found hidden in the cooler. And though

Defendant admitted she occasionally used methamphetamine, she was not charged with that offense.

¶28 The state, citing *U.S. v. Selby*, 557 F.3d 968 (9th Cir. 2009) and *U.S. v. Barajas*, 360 F.3d 1037 (9th Cir. 2004), contends that the jury could have believed that Defendant knew about the drugs because statements she made at her interview conflicted with the testimony of police officers at trial.[4] But neither *Selby* nor *Barajas* aid the state. In *Selby*, the question was "whether the jury had sufficient evidence to overcome Selby's testimony regarding her own state of mind." 557 F.3d at 975. There, the state presented substantial evidence from which the jury could infer Selby's knowledge. *Id.* at 975-76. Here, the state has not. And in *Barajas*, Barajas was arrested at a remote and isolated marijuana farm with a cultivating tool on his belt, and his fingerprints were found on a beer can at a trailer 400 yards away. 360 F.3d at 1039-40. Barajas testified that he had arrived at the farm after dark and thought it was a

[4] As in its closing argument, the state's brief mischaracterizes whether Defendant's statements contradict the testimony of the police surveillance teams. For example, the state alleges that Defendant contradicted the officer's observation that the Thunderbird was still headed west on I-40 when it pulled off to stop at the Dairy Queen. But when asked by the detectives whether they passed the Dairy Queen and then turned around to go back to it, Defendant clearly answered "No. We were going towards Barstow, to get truck parts, and then he called, and it was too late to get the truck parts, so we turned around and got off the freeway, got back on it, and then we went to Dairy Queen because I had to go to the bathroom."

tomato farm, and that he had not visited the trailer where the beer can was found. *Id.* at 1040. "[B]ased on the observations of the arresting officers, the inferences that can be drawn from the totality of the circumstances, and Mr. Barajas's implausible testimony," the jury could infer the opposite of what Barajas testified. *Id.* at 1042. In *Barajas* and *Selby*, there was sufficient evidence to infer the defendants' knowledge despite their testimony to the contrary. That is not the case here.

¶29 For these reasons, we hold as a matter of law that there is insufficient evidence to support Defendant's convictions, either as a principal or as an accomplice.[5]

[5] Farmer also appeals the trial court's exclusion of Graham's video-recorded interview. Because we conclude that her conviction cannot stand, we need not address that issue.

CONCLUSION

¶30 For the reasons given, we vacate Defendant's convictions and sentences. Because we vacate the conviction based on the insufficiency of the evidence, Defendant may not be retried for these offenses, and we remand for entry of an order dismissing the charges with prejudice. *State v. Sowards*, 147 Ariz. 156, 158, 709 P.2d 513, 515 (1985) (citing *Greene v. Massey*, 437 U.S. 19 (1978)).

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
LAWRENCE F. WINTHROP, Presiding Judge

/s/
_____
MICHAEL J. BROWN, Judge