DIVISION ONE
FILED: 11/03/2011
RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 10-0811
	)	
Appellee,	)	DEPARTMENT E
	)	
v.	)	**MEMORANDUM DECISION**
	)	
JACKIE LARAE SCOTT,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	
	)	

Appeal from the Superior Court in Yavapai County

Cause No. P1300CR20100282

The Honorable Ethan A. Wolfinger, Judge *Pro Tempore*

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Liza-Jane Capatos, Assistant Attorney General
Attorneys for Appellee

The Law Office of David Goldberg — Ft. Collins, CO
by David Goldberg
Attorney for Appellant

G E M M I L L, Judge

¶1 Jackie Larae Scott appeals her convictions and sentences on two counts of possession of a dangerous drug,

methamphetamine, for sale, and two counts of possession of methamphetamine drug paraphernalia. She argues the evidence was insufficient to support her convictions, and the judge fundamentally erred in admitting evidence of other acts and evidence of her exercise of her right to remain silent. For the reasons that follow, we find no reversible error and affirm.

¶2 The evidence, viewed in the light most favorable to supporting the convictions,[1] was as follows. An undercover narcotics detective traveled to Scott's home in Mayer and, after talking to some people outside, asked her if she could supply him with some methamphetamine. The undercover detective offered to drive Scott to Cordes Junction, where she said she could obtain the drug. Once they arrived in Cordes Junction, the detective gave her $60, and after some delay, drove Scott to a nearby market. Scott went inside the market, and shortly thereafter exited and gave him a plastic baggie containing .26 grams of methamphetamine. The undercover detective gave her some of the drug for herself and drove her home.

¶3 A week later, the undercover detective returned to Scott's home and asked her if she could hook him up with methamphetamine again. She ran up to a man walking in the neighborhood and spoke to him briefly. When the man returned,

[1] *State v. Moody*, 208 Ariz. 424, 435 n.1, ¶ 2, 94 P.3d 1119, 1130 n.1 (2004).

the undercover detective gave Scott $60, which she gave to the man in exchange for the drugs. Scott went into a back room of her home for a short time, and then handed a plastic baggie containing .22 grams of methamphetamine to the undercover officer.

¶4 The jury convicted Scott of the charged crimes of two counts of possession of methamphetamine for sale and two counts of possession of drug paraphernalia. The judge sentenced Scott to concurrent sentences, the longest of which was five years. Scott filed a timely notice of appeal.

Sufficiency of Evidence

¶5 Scott argues that insufficient evidence supported her convictions. In reviewing the sufficiency of 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). Evidence is sufficient when it is more than a mere scintilla and is such proof as could convince reasonable persons of defendant's guilt beyond a reasonable doubt. *State v. Tison,* 129 Ariz. 546, 553, 633 P.2d 355, 362 (1981). "Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction." *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (citation omitted).

¶6 Scott argues first that the evidence showed she handled the baggies of methamphetamine only briefly as a middleman and that this transitory handling was insufficient as a matter of law to demonstrate the requisite control and dominion necessary to prove possession. We do not agree. In interpreting statutes, we make every effort to give effect to the intent of the legislature. *Mejak v. Granville,* 212 Ariz. 555, 557, ¶ 8, 136 P.3d 874, 876 (2006). We consider the statutory language the best indicator of that intent, and we go no further to ascertain the intent if the language of the statute is clear and unambiguous. *Id.*; *see also State v. Reynolds*, 170 Ariz. 233, 234, 823 P.2d 681, 682 (1992). Pursuant to Arizona Revised Statutes ("A.R.S.") section 13-3407(A)(2) (2010)[2] provides that "[a] person shall not knowingly . . . [p]ossess a dangerous drug for sale." Section 13-3415(A) (2010), A.R.S., makes it "unlawful for any person to use, or to possess with intent to use, drug paraphernalia to . . . contain . . . a drug in violation of this chapter." The legislature has defined "possess" to mean "knowingly to have physical possession or otherwise to exercise dominion or control over property." A.R.S. § 13-105(33) (2010) (emphasis added). Thus, in order to prove knowing possession the State was required to prove that

[2] We cite to the current version of the statutes, which is unchanged in pertinent part from the statutory language in effect at the time of these offenses in October 2009.

Scott either knowingly had "physical possession" of the baggies of methamphetamine, or that she "otherwise . . . exercise[d] dominion or control" over the baggies of methamphetamine. The undercover officer testified that Scott handed him each baggie of methamphetamine after he gave her $60. The evidence thus was sufficient to prove that she physically possessed the methamphetamine and the paraphernalia, the baggie, for however brief a period of time. This was all that was necessary to show possession of the prohibited drug and drug paraphernalia. *See id.*

¶7 Scott misplaces her reliance on cases that address the sufficiency of the evidence of constructive possession in the absence of actual possession, none of which hold that "transitory handling" of the prohibited substance is insufficient to show possession. In *State v. Barreras*, 112 Ariz. 421, 542 P.2d 1120 (1975), the case on which Scott most heavily relies, the evidence showed that defendant agreed to arrange for the sale of heroin to an undercover officer, and may have sampled some heroin, but never actually or even constructively possessed the heroin at issue. *Id.* at 422-23, 542 P.2d at 1121-22. The supplier was showing the undercover officer the heroin at the time other law enforcement officers appeared and arrested defendant, his wife, the supplier, and a fourth person who acted as a "go-between," linking the supplier

with the undercover officer. *Id*. The court held that the evidence was insufficient to show that defendant had the requisite dominion and control over the heroin to support a conviction for possession. *Id*. at 423, 542 P.2d at 1122. The other cases on which Scott relies also address constructive possession in the absence of any physical possession. *See State v. Cox*, 214 Ariz. 518, 519-21, ¶¶ 1-15, 155 P.3d 357, 358-60 (App. 2007)[3] (evidence showed defendant possessed the weapons found in the trunk of his vehicle); *State v. Villavicencio*, 108 Ariz. 518, 520, 502 P.2d 1337, 1339 (1972) (evidence showed defendant possessed drugs discovered in box on the back porch of his apartment); *State v. Curtis*, 114 Ariz. 527, 528, 530, 562 P.2d 407, 408, 410 (App. 1977) (evidence failed to show that defendant possessed marijuana on the table in an apartment she was visiting); *State v. Miramon*, 27 Ariz. App. 451, 452-53, 555 P.2d 1139, 1140-41 (1976) (evidence failed to show that defendant possessed marijuana under his seat in the vehicle in which he was a passenger).

¶8 None of the cases on which Scott relies hold that "transitory handling" of the prohibited drug does not constitute possession. Nor has the legislature seen fit to define possession as excluding "transitory handling." *See* A.R.S. § 13-105(33). We decline to read such a requirement into the law.

[3] Affirmed by 217 Ariz. 353, 174 P.3d 265 (2007).

See United States v. DeCologero, 530 F.3d 36, 67 (1st Cir. 2008) ("Possession, whether actual or constructive, can be extremely brief; a minute of possession is as much an offense as a year of possession") (internal punctuation and citation omitted); *cf. Cox*, 217 Ariz. at 356, ¶¶ 17-21, 174 P.3d at 268 (holding that the statutory definition does not require that possession be "with the intent to control the use or management thereof or with the intent to guide or manage the [item]"). Again, in this case, the evidence showed that Scott physically possessed the methamphetamine when she gave it to the undercover officer in exchange for money. These facts are sufficient to show physical possession and distinguish this case from the constructive possession cases on which Scott relies.

¶9 Scott also argues that even if her transitory handling of the methamphetamine was sufficient to constitute possession, the evidence failed to show that she possessed the methamphetamine for sale. We find no merit in this argument either. "Sale" or "sell" is defined as "an exchange for anything of value or advantage, present or prospective." A.R.S. § 13-3401(32) (Supp. 2010). The undercover officer testified that he asked Scott to obtain some methamphetamine, and Scott gave him methamphetamine in exchange for money. This evidence was more than sufficient to show that she possessed the methamphetamine for sale. Although the evidence was also

sufficient to show that Scott obtained some of the drugs for herself in each transaction, the definition of the offense does not require proof that the seller actually personally benefitted from the sale. The evidence in this case, in short, was more than sufficient to prove the charged crimes.

Admission of Other Acts Evidence

¶10 Scott argues that the trial court committed reversible error by admitting testimony from the undercover detective that Scott had called him a month after the charged conduct and offered to obtain more drugs for him. She also argues that the trial court committed reversible error in admitting testimony from the same undercover detective that he had attempted without success to purchase drugs from one of her relatives some time after the charged conduct.

¶11 We generally review the admissibility of other act evidence for abuse of discretion. *State v. Gulbrandson*, 184 Ariz. 46, 60, 906 P.2d 579, 593 (1995). Because Scott did not object at trial to any of this testimony, however, we review this claim for fundamental error only. *See State v. Henderson*, 210 Ariz. 561, 568, ¶ 22, 115 P.3d 601, 608 (2005). On fundamental error review, the defendant bears the burden of proving error, that the error was fundamental, and that she was prejudiced thereby. *Id.* Fundamental error is error going to the foundation of the case, error that takes from the defendant

a right essential to her defense, and error of such magnitude that she could not have received a fair trial. *Id*. at ¶ 24.

¶12 We find no error, much less fundamental error, in admission of the testimony that Scott had called the undercover officer a month after the charged conduct and offered to obtain more drugs for him. Arizona Rule of Evidence 404(b) provides that evidence of other crimes, wrongs, or acts is not admissible to "prove the character of a person in order to show action in conformity therewith," but may be admissible for limited purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[4] Before such evidence may be admitted, there must be clear and convincing proof "both as to the commission of the

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[4] Scott misconstrues case law pre-dating the adoption in 1977 of the Arizona Rules of Evidence as generally precluding the introduction of other acts at trial except to support an entrapment defense. The cases on which Scott relies rather presage Rule 404 with reasoning that other act evidence is not generally admissible to show propensity, but may be relevant and admissible to prove a disputed issue of intent, knowledge, or identity. *See State v. Tuell,* 112 Ariz. 340, 344, 541 P.2d 1142, 1146 (1975) (holding that other act was not relevant to any of the issues in dispute); *State v. Petralia,* 110 Ariz. 530, 534-35, 521 P.2d 617, 621-22 (1974) (holding that other act was admissible to show proof of intent of defendant in entrapment case); *State v. Young*, 115 Ariz. 162, 163, 564 P.2d 385, 387 (App. 1977) (holding that other act was admissible to show predisposition and proof of intent of defendant in entrapment case); *State v. Little*, 87 Ariz. 295, 303-04, 350 P.2d 756, 761 (1960) (holding that other act was inadmissible to show common scheme or plan, because of lack of foundation for exception).

other bad act and that the defendant committed the act." *State v. Anthony,* 218 Ariz. 439, 444, ¶ 33, 189 P.3d 366, 371 (2008) (quoting *State v. Terrazas*, 189 Ariz. 580, 584, 944 P.2d 1194, 1198 (1997)). When an appropriate objection has been made at trial, the judge must also find that 1) the evidence is being offered for a proper purpose; 2) the evidence is relevant to that purpose; and 3) its probative value is not substantially outweighed by unfair prejudice. *Id.* If requested, the judge must provide an appropriate limiting instruction. *Id.*

¶13 We cannot say that the judge abused his discretion in not sua sponte striking the evidence. The undercover officer testified that Scott called him and offered to obtain more drugs for him. This testimony was sufficient to prove the other act by clear and convincing evidence, distinguishing it from the cases on which Scott relies. *See Anthony*, 218 Ariz. at 444-45, ¶¶ 34-37, 189 P.3d at 371-72 (holding that inconclusive forensic evidence was insufficient to prove that defendant had committed the other act); *State v. Curiel*, 130 Ariz. 176, 182, 634 P.3d 988, 994 (App. 1981) (holding that evidence of another drug sale was inadmissible because, at most, only an inference linked defendant to residence where sale took place).

¶14 Scott's offer to obtain more drugs for sale, moreover, was relevant for a proper purpose under Rule 404(b), on an issue that she concedes was a matter of dispute: whether

she intended to sell the methamphetamine at the time of the charged incidents. The fact that the offer to obtain more drugs was made after the incidents giving rise to the charged offenses, and not before, nevertheless reflects on her continuing intent to sell drugs. *See Tuell*, 112 Ariz. at 344, 541 P.2d at 1146 ("Intent . . . may properly be established by subsequent acts."); *State v. Moreno*, 153 Ariz. 67, 68, 734 P.2d 609, 610 (App. 1986) ("subsequent bad acts . . . are analyzed exactly as are prior bad acts"). Her argument that she was unfairly prejudiced because she only learned of the evidence mid-trial and thus was unable to meaningfully contest it is not supported by the record: both the prosecutor and defense counsel referred to this evidence in their opening statements. Moreover, at the close of evidence, the judge specifically instructed the jury that it could consider evidence of the "other act" only if it found that the State had proved the act by clear and convincing evidence, and only as relevant to Scott's motive, preparation, intent, and other admissible purposes, and not as evidence that defendant acted in conformity therewith on the two occasions from which the charges arose. On this record, we find no error, much less fundamental error, in admission of this testimony.

¶15 The undercover officer's unsolicited testimony that he had unsuccessfully attempted to buy drugs from one of Scott's

relatives some time after the charged incidents did not rise to the level of a prior bad act by Scott subject to Rule 404(b), much less require reversal. *See State v. Jones,* 197 Ariz. 290, 304-05, ¶¶ 31, 34–35, 4 P.3d 345, 359-60 (2000) (holding that trial court did not abuse its discretion in refusing to declare a mistrial following a witness's unsolicited vague references to a prior crime committed by defendant); *Peyton v. Commonwealth,* 253 S.W.3d 504, 517 (Ky. 2008) (holding that witness's statement that he had dealt with the defendant on many different occasions was "vague and did not allude to any particular bad act [the defendant] committed" and, thus, did not fall under Rule 404(b)); *State v. Trout*, 757 N.W.2d 556, 558 (N.D. 2008) (finding detective's testimony about "some other information" obtained by police, and that the detective called defendant's employer to "check up on another incident that occurred in his building" were "too vague to be unduly prejudicial"). The parties in fact agreed at trial that it would be "a stretch" to consider this testimony evidence of an "other act." We decline to reverse on this basis.

Invocation of Right to Remain Silent

¶16 Scott also argues that the trial court fundamentally erred and violated her due process rights in allowing the undercover detective to testify that Scott had invoked her right to remain silent. "[T]he use for impeachment purposes of [a

defendant's] silence, at the time of arrest and after receiving [*Miranda*[5]] warnings, violate[s] the Due Process Clause of the Fourteenth Amendment." *Doyle v. Ohio,* 426 U.S. 610, 619 (1976) "*Doyle* rests on the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial." *Wainwright v. Greenfield*, 474 U.S. 284, 291 (1986) (internal punctuation and citations omitted). "A prosecutor may, however, comment on a defendant's pre-*Miranda* warnings silence, either before or after arrest, because no governmental action induced petitioner to remain silent, and thus, the fundamental unfairness present in *Doyle* is not present." *State v. Ramirez*, 178 Ariz. 116, 125, 871 P.2d 237, 246 (1994).

¶17 The testimony that Scott refused to talk to the undercover detective after her arrest was first elicited by Scott, on cross-examination of the detective, in pertinent part as follows:

> **Q:** [Y]ou were present after she was arrested?
> **A:** Yes, I was.
>
> **Q:** Did you confront her?
> **A:** Yes, I did.
>
> **Q.** Do you know if she was ever under [*Miranda*] rights at any point?
> **A.** I don't know.

[5] *Miranda v. Arizona*, 384 U.S. 436 (1966).

Q: Was she questioned after her arrest?
A: She was not. I believe there was an attempt maybe by Detective Johnson. So yeah. I would say that he did. Although I guess I should retract that. I wasn't there. I don't know. I'm assuming he did.

Q: I think you caught on to my theme.
When you confronted Jackie with the CRI [confidential reliable informant] – you're with the CRI, and in the recording you're telling him that you're going to ask Jackie for information just like you were asking him for information?
A: Yes.

Q: Did you ask Jackie for information?
A: We were going to attempt to.

Q: But then you decided not to?
A: She decided not to.

Q: She didn't tell you anything?
A: No, she did not.

On re-direct, the prosecutor asked:

Q: I'll just start where Mr. Martin left off. Since he asked you so many questions about whether you asked Jackie any questions, would you refer to your report, please, and tell us what you wrote about your conversation with her.
A: You want me to read the bottom paragraph?

Q: Probably just the last line.
A: Okay. I asked her if she would talk to me. She was belligerent and refused to talk to me.

Scott did not object to the detective's testimony at trial, and objects on appeal only to the testimony elicited by the prosecutor that "I asked her if she would talk to me. She was belligerent and refused to talk to me." The prosecutor never mentioned this exchange in closing argument. Defense counsel,

however, referred to her refusal to provide information to the undercover detective in his closing argument, characterizing Scott as a "little fish," who, unlike the CRI, refused to provide information to assist the officers in snaring others, specifically, her own mother.

¶18 Because Scott did not object at trial, we ordinarily would review this issue for fundamental error only. *See Henderson*, 210 Ariz. at 568, ¶ 22, 115 P.3d at 608. On this record, however, Scott herself opened this line of inquiry, and accordingly is precluded from complaining about it on appeal. *See State v. Doerr*, 193 Ariz. 56, 63, ¶¶ 26-27, 969 P.2d 1168, 1175 (1998) (holding that defendant opened the door to officer's explanation of why he believed defendant had been untruthful, and accordingly he was barred from complaining about it); *State v. Woratzeck,* 134 Ariz. 452, 454, 657 P.2d 865, 867 (1982) (holding that defense counsel opened the door to inquiry about defendant's involvement in a rape/robbery by introducing and developing the topic on cross-examination of witness); *State v. Garcia*, 133 Ariz. 522, 525-26, 652 P.2d 1045, 148-49 (1982) ("defense counsel's conduct in extensively developing the subject of information obtained from the 'Silent Witness' caller opened the door for the caller's exact statement to come in" over defendant's hearsay objection). A defendant's questions do not "open the door," however, to follow-up questions that are

not "pertinent" or "specifically responsive to the invitation." *See State v. Wilson*, 185 Ariz. 254, 259, 914 P.2d 1346, 1351 (App. 1995) (holding that prosecutor's questioning on defendant's refusal to consent to search was not pertinent to testimony elicited by defense counsel that defendant was cooperative at the time of his arrest).

¶19 Scott opened this line of inquiry apparently as part of a broader strategy to portray herself as someone who was not actually a drug dealer, but was simply being used by law enforcement to snare bigger dealers, including her mother, a role she refused to play. In her follow-up question, the prosecutor simply asked the detective to describe the context surrounding this interaction, a question that was "specifically responsive to the invitation." *Wilson*, 185 Ariz. at 259, 914 P.2d at 1351. Scott accordingly cannot now complain of the result she caused. *See Doerr*, 193 Ariz. at 63, ¶ 27, 969 P.2d at 1175. Scott's challenge to the prosecutor's cross-examination is thus barred. *See id.*

¶20 Moreover, even if Scott's challenge is not barred, and even assuming fundamental error, the evidence against Scott was overwhelming, and the detective's testimony that Scott refused to respond to his questions and was belligerent was cumulative of the earlier testimony elicited by her own counsel. Any error accordingly was not prejudicial, as required for

reversal on fundamental error review. *See Henderson,* 210 Ariz. at 568, ¶ 26, 115 P.3d at 608 (holding that showing of prejudice that defendant must make varies depending upon the type of error that occurred and the facts of the particular case); *Brecht v. Abrahamson*, 507 U.S. 619, 639 (1993) (holding that *Doyle* error did not entitle defendant to *habeas* relief because it did not "substantially influence" the jury's verdict in light of the weighty evidence and the prosecutor's infrequent references to defendant's post-*Miranda* silence, which were cumulative to the permissible references to his pre-*Miranda* silence).

Conclusion

¶21 For the foregoing reasons, we affirm Scott's convictions and sentences.

/s/
JOHN C. GEMMILL, Presiding Judge

CONCURRING:

/s/
PATRICK IRVINE, Judge

/s/
DONN KESSLER, Judge