IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 12/27/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

STATE OF ARIZONA,	)	No. 1 CA-CR 10-0924
	)	
Appellant,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
MANUEL L. OCHOA,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellee.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-114600-001DT

The Honorable John R. Hannah, Jr., Judge

REVERSED AND REMANDED

William G. Montgomery, Maricopa County Attorney — Phoenix
By Gerald R. Grant, Deputy County Attorney
Attorneys for Appellant

Marty Lieberman, Maricopa County Legal Defender — Phoenix
By Cynthia D. Beck, Deputy Legal Defender
Attorneys for Appellee

S W A N N, Judge

¶1 The state appeals the trial court's grant of a new trial. The trial court determined that the evidence was insufficient to sustain the jury's guilty verdict, and granted Defendant's motion for new trial on the ground that the verdict

was contrary to law. On de novo review, we find that the evidence was sufficient to sustain the convictions and therefore reverse.

FACTS AND PROCEDURAL HISTORY[1]

¶2 Manuel Ochoa ("Defendant") was charged with possession of marijuana for sale (having a weight greater than four pounds), a class two felony, and possession of drug paraphernalia, a class six felony, following execution of a search warrant at a South Phoenix home on March 3, 2008. Defendant, his brother,[2] and the brother's two small children were at the home when officers entered to execute the warrant. During the search, officers found over four pounds of marijuana, a scale, baggies, a bong, a joint and $250 cash.

¶3 Defendant was convicted of possession of marijuana for sale and possession of drug paraphernalia following a five-day trial that began on September 8, 2008. During trial, Defendant moved for judgment of acquittal under Rule 20(a), first at the close of the state's case and again after he presented additional testimony. The trial court denied both motions. After the guilty verdicts, Defendant filed separate motions for

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[1] We view the facts in the light most favorable to sustaining the convictions. *State v. Haight-Gyuro*, 218 Ariz. 356, 357, ¶ 2, 186 P.3d 33, 34 (App. 2008).

[2] Defendant's brother was also charged with the same offenses, but pled guilty to the amended count of attempting to possess marijuana for sale.

judgment of acquittal under Rule 20(b) and for new trial on the basis of insufficiency of the evidence under Rule 24.

¶4 The trial court granted Defendant's Rule 20(b) motion, and found that the motion for new trial was moot. The state appealed, and we reversed on the basis that *State ex rel. Hyder v. Superior Court*, 128 Ariz. 216, 624 P.2d 1264 (1981), precluded consideration of a post-trial motion based on insufficiency of the evidence absent a finding that some evidence had been admitted in error. *State v. Ochoa*, 1 CA-CR 08-0928, 2009 WL 3837030 (Ariz. App. Nov. 17, 2009) (mem. decision) (*Ochoa I)*. On July 20, 2010, the trial court held a status conference to discuss the necessary proceedings after our decision and suggested that the further proceedings would be based upon Defendant's original motion for new trial. The trial court explained its view that our decision was "not a model of clarity," and expressed doubt whether we had addressed the merits of the case or merely its procedural error under *Hyder*. After supplemental briefing by both sides, the trial court granted Defendant's motion for a new trial.

¶5 The state timely appeals. We have jurisdiction under the Arizona Constitution, article 6, section 9 and A.R.S. §§ 12.120.21(A)(1), 13-4031 and -4032(2).

DISCUSSION

I. THE TRIAL COURT HAD THE AUTHORITY TO CONSIDER THE SUFFICIENCY OF THE EVIDIENCE.

¶6 In May 2011, after we decided *Ochoa I* and the trial court ruled on Defendant's Rule 24(c)(1) motion for new trial, the Supreme Court overruled *Hyder* to the extent that it imposed procedural hurdles to the consideration of a Rule 20 motion after a verdict. *State v. West*, 226 Ariz. 559, 562, ¶ 14, 250 P.3d 1188, 1191 (2011). Under *West*, the standard governing motions under Rule 20(a) and Rule 20(b) is the same: "whether the record contains 'substantial evidence to warrant a conviction.'" *Id.* (citing Ariz. R. Crim. P. 20(a)).

¶7 Had *West* been the law at the time of Defendant's initial appeal, we would not have reversed the trial court's grant of Defendant's Rule 20(b) motion on the basis of the procedural distinction between pre- and post-verdict motions for judgment of acquittal. *Ochoa I* was based solely on the trial court's failure to satisfy that procedural requirement, and we agree with the trial court that our prior decision was not a decision on the merits as to the sufficiency of the evidence. Indeed, as the trial court pointed out, the record on appeal in *Ochoa I* would not have permitted us to review the merits because only portions of the transcripts were provided.

¶8 The trial court then considered Defendant's Rule 24.1(c)(1) motion for new trial, and essentially restated its view that the evidence was insufficient to support a conviction. It made no comment on the weight of the evidence. Because it viewed the evidence as insufficient, the trial court determined that the verdict was "contrary to law" under Rule 24.1(c)(1) and *Peak v. Acuña*, 203 Ariz. 83, 50 P.3d 833 (2002). Though this approach might have represented an impermissible end run around *Hyder*, it was salvaged by *West* and we therefore find no error in the court's decision to address the sufficiency of the evidence when it did.

II. BECAUSE THE TRIAL COURT ADDRESSED ONLY THE SUFFICIENCY, AND NOT THE WEIGHT, OF THE EVIDENCE, WE REVIEW ITS DETERMINATION DE NOVO.

¶9 Rule 24.1(c)(1) provides two distinct grounds on which a trial court can order a new trial -- a verdict that is contrary to the weight of the evidence or one that is contrary to law. Ariz. R. Crim. P. 24.1(c)(1). The trial court recognized the difference between the two prongs of 24.1(c)(1) and correctly noted that a sufficiency of the evidence analysis may be undertaken under the "contrary to law" prong of the Rule. *See State v. Cox*, 217 Ariz. 353, 357, ¶ 22, 174 P.3d 265, 269 (2007); *State v. Fischer*, 219 Ariz. 408, 418, ¶¶ 38-39, 199 P.3d 663, 673 (App. 2008).

¶10 Analyses of the weight of the evidence and sufficiency of the evidence involve distinct exercises, and are reviewed under different standards. In *Brownell v. Freedman*, 39 Ariz. 385, 389, 6 P.2d 1115, 1116 (1932), the court held with regard to the weight of the evidence:

> It must be remembered that a very different rule applies to the setting aside of a verdict by the trial court on the ground that it is contrary to the weight of the evidence and to the same action taken by this court. We have invariably held that this court will not disturb a verdict on the ground that it is contrary to the weight of the evidence. On the other hand, we have held with equal emphasis that it is not only the right of the trial court to set it aside under such circumstances, but that it is its duty, and we have even gone so far as to express our regret that trial courts did not more courageously and frequently exercise their prerogative in this respect. The trial judge, so far as this duty is concerned, sits as a thirteenth juror, and he, as well as the jury, must be convinced that the weight of the evidence sustains the verdict, or it is his imperative duty to set it aside, and his discretion can no more be questioned by us, except for an abuse thereof, when he uses it in favor of setting aside a verdict, than when he exercises it in an opposite manner and refuses to take such action.

(citation omitted).

¶11 Sufficiency of the evidence is an entirely different concept. In a sufficiency analysis, the trial court is not relying upon its own impressions of witness credibility and other factors affecting the weight of the evidence. Instead, it

evaluates whether the state's evidence, if believed, would be legally sufficient to support a conviction. Such an analysis does not depend upon the trial judge's role as an observer at trial –- it is a legal question that we are equally well-situated to resolve. "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). We review the sufficiency of the evidence de novo. *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993). "On appeal by the defendant, we must consider the evidence in the light most favorable to sustaining the verdicts, and therefore must resolve all conflicts of evidence against the defendant. Furthermore there must be a complete lack of probative evidence supporting the verdict to mandate reversal." *State v. Girdler*, 138 Ariz. 482, 488, 675 P.2d 1301, 1307 (1983).

¶12 Mindful of these very different standards, we acknowledge that a trial court may rightfully weigh the evidence and determine the credibility of witnesses under the weight of the evidence prong of Rule 24.1(c)(1) and that such a ruling is entitled to great deference. *State v. Tubbs*, 155 Ariz. 533, 535, 747 P.2d 1232, 1234 (App. 1987). Here, unlike in *Peak*, the basis upon which the trial court ordered the new trial is

unmistakable -- it based its ruling solely on the sufficiency of the evidence. We therefore turn to a de novo review of the evidence. *See West*, 226 Ariz. at 562, ¶ 15, 250 P.3d at 1191 (citing *Bible*, 175 Ariz. at 595, 858 P.2d at 1198).

III. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE CONVICTIONS.

¶13 To evaluate sufficiency of the evidence, we do not reweigh the evidence on appeal, but focus on "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." *West*, 226 Ariz. at 562, ¶ 15, 250 P.3d at 1191 (citing *State v. Mathers*, 165 Ariz. 64, 66, 796 P.2d 866, 868 (1990)). Additionally, a criminal conviction may rest on circumstantial evidence alone and to carry its burden, the prosecution is *not* required to "negate every conceivable hypothesis of innocence when guilt has been established by circumstantial evidence." *State v. Nash*, 143 Ariz. 392, 404, 694 P.2d 222, 234 (1985) (citation omitted). Accordingly, we must resolve all reasonable inferences against the defendant and "[w]hen reasonable minds may differ on inferences drawn from the facts," the trial court has no discretion to grant a motion for new trial based on a sufficiency of the evidence analysis. *See State v. Lee*, 189 Ariz. 590, 603, 944 P.2d 1204, 1217 (1997) (applying the

standard in the analogous context of a Rule 20 sufficiency of the evidence analysis).

¶14 Here, the trial court granted Defendant's motion for new trial on the ground that "the evidence [was] not sufficient to permit reasonable jurors to find beyond a reasonable doubt that [Defendant] possessed marijuana for sale or that he possessed drug paraphernalia." Specifically, the court ruled that the evidence was insufficient to prove Defendant's knowledge of the marijuana in the bedroom and that Defendant exercised dominion or control of the paraphernalia and marijuana in the kitchen. The evidence presented at trial –- and the trial court's own observations about that evidence -- establish otherwise.

¶15 Our review of the entire record reveals the following evidence. Officers executed a search warrant at 11:30 a.m. at the home. Upon entry, officers could readily smell the odor of fresh marijuana. The only adults present in the home were Defendant and his brother. When searching the home, officers found two bags of marijuana[3] inside another bag which was inside a bin in the closet of a bedroom labeled bedroom "D." A clothing tag indicating size "XXL" was on a table just outside the bedroom D closet -- Defendant's body size was consistent with this size clothing -- and men's clothing was scattered

[3] The marijuana found in the bedroom weighed 1.96 pounds.

throughout the room. Defendant's Arizona identification card bearing the same address as the searched home and Defendant's Social Security card were found in a wallet on the dresser in bedroom D. Defendant told investigators he "lived all over the house" and that he had lived there for four months.

¶16 In the kitchen, officers found a digital scale, a bong, plastic baggies, bags of marijuana,[4] cash and a lockbox. The marijuana, scale and baggies were found in cabinets alongside hotdog buns, cans of food, tortillas and bread. With the exception of a joint in the living room, no marijuana was found in any location other than the kitchen and bedroom D.

¶17 In its ruling on the motion for new trial, the trial court recognized: "[t]he jury could reasonably have inferred that the defendant, and everyone else who lived in the house, knew about the marijuana in the kitchen and had access to it"; "the residents . . . would have smelled marijuana every time they walked through the door, and they would have seen it every time they reached for a slice of bread or a can of soup"; and "the evidence [was] sufficient to show that [Defendant] was living in [bedroom D]." From this evidence, we conclude that a reasonable jury could find beyond a reasonable doubt that Defendant had the authority to decide whether marijuana would be

[4] The marijuana in the kitchen weighed 2.17 pounds.

kept in the room and that he constructively possessed the marijuana in bedroom D.

¶18 In *State v. Parra*, 104 Ariz. 524, 525, 456 P.2d 382, 383 (1969), the court held that "to warrant a conviction based solely on circumstantial evidence, the evidence must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence." The trial court relied on this language, ruling that the evidence "obviously supports the conclusion that one or more people possessed marijuana for sale at [the residence]" but that the evidence was "entirely consistent with the hypothesis that [Defendant] was not one of those people."

¶19 We disagree that the evidence required the jury to speculate as to Defendant's involvement. The reasonable inferences that could have been drawn from the evidence support the conclusion that Defendant possessed the marijuana and paraphernalia (exclusively or jointly). *Parra* does not stand for the proposition that circumstantial evidence must support *no* inferences inconsistent with guilt. Rather, it stands for the proposition that the jury must satisfy itself that the inferences it actually draws are inconsistent with any reasonable hypothesis of innocence. The state is not required to negate every conceivable hypothesis of innocence. *Nash*, 143 Ariz. at 404, 694 P.2d at 234. Considering the evidence

outlined above and the trial court's own reflections on that evidence, we discern no grounds upon which to hold that no reasonable jury could have convicted.

¶20 We have reviewed the record to determine whether it contains "such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt,'" *Mathers*, 165 Ariz. at 67, 796 P.2d at 869 (citations omitted), and upon this review, we have determined that reasonable persons could accept the evidence presented by the state as adequate to support the conclusion that Defendant is guilty beyond a reasonable doubt. We further note, for the sake of clarity, that our ruling forecloses the trial court from further inquiry as to sufficiency of the evidence.

CONCLUSION

¶21 For the reasons discussed above, we reverse and remand for proceedings not inconsistent with this decision.

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
MARGARET H. DOWNIE, Presiding Judge

/s/
_____
DONN KESSLER, Judge