IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

GEORGE CLEVELAND GILL,
Appellant.

No. 2 CA-CR 2019-0015
Filed February 21, 2020

Appeal from the Superior Court in Cochise County
No. CR201800272
The Honorable James L. Conlogue, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
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Counsel for Appellee

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By John William Lovell
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OPINION

Judge Espinosa authored the opinion of the Court, in which Presiding Judge Eppich and Judge Eckerstrom concurred.

E S P I N O S A, Judge:

¶1 George Gill appeals his convictions and sentences for possession of methamphetamine, possession of drug paraphernalia, and using a building to unlawfully sell, manufacture, or distribute a narcotic or dangerous drug. He argues the evidence was insufficient to support those convictions and, in particular, that a required element of the unlawful-use statute was not met. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the jury's verdicts, resolving all reasonable inferences against Gill. *State v. George*, 206 Ariz. 436, ¶ 3 (App. 2003). In early 2018, Detective Benjamin Berry of the Cochise County Sheriff's Office began assisting the Drug Enforcement Administration (DEA) with surveillance at a house where Gill resided in Sierra Vista. DEA Agent Cullen Connerly had observed "nonstop traffic all day long" at the residence, with multiple individuals arriving and staying for brief amounts of time before leaving, which Connerly believed indicated drug trafficking. On March 6, 2018, police conducted traffic stops of vehicles leaving the residence, and the occupants of those vehicles possessed heroin and methamphetamine. Later that day, a search warrant was executed at the residence, which was a small, run-down, single-room studio-type arrangement with sheets hanging from the ceiling to partition sleeping areas. Gill was one of several people who came out of the house during the search, some of whom possessed heroin, methamphetamine, marijuana, and syringes.

¶3 A particular area in the back of the house was deemed Gill's because his property, including a debit card bearing his name, lay on the bed there. In that area, Detective Berry also found a syringe and a methamphetamine pipe. Officers found items "indicative of narcotics possession or trafficking" throughout the residence including "seals"—"small baggies, which normally would be used to place illegal substances in"—multiple scales, including a small white scale sitting on a dresser

outside of Gill's area; and a red and black bag containing syringes, rolling papers, seals, and a quantity of methamphetamine "only a couple steps" from Gill's partition. Additionally, two security cameras—one inside the house and one outside—had live feeds to a video monitor in Gill's space.

¶4 During an interview by Agent Connerly, Gill said he lived at the residence with two other people and was aware that drugs were in the house and were being sold there. Gill claimed he used heroin and methamphetamine but did not "get out on the street and deal," instead, only trading drugs "back and forth." Gill agreed "[he's] a guy people can go to [asking for] . . . heroin [and] meth," and multiple people had asked him for drugs that day. But he claimed he only had a small amount of methamphetamine in the house.

¶5 A grand jury charged Gill with three counts of possession of drug paraphernalia and one count each of possession of a dangerous drug for sale (methamphetamine), possession of a narcotic drug for sale (heroin), and use of a building for the purpose of unlawfully selling, manufacturing, or distributing a dangerous or narcotic drug. During trial, on the state's motion, the court dismissed with prejudice the possession of heroin for sale charge. After the close of the state's evidence, Gill moved for judgment of acquittal on all charges, which the court denied. A jury convicted him as noted above, and he was sentenced to a combination of concurrent and consecutive terms of imprisonment totaling 6.25 years. We have jurisdiction over his appeal pursuant to A.R.S. §§ 12-120.21, 13-4031, and 13-4033.

Motion for Judgment of Acquittal

¶6 Gill contends the trial court erred by denying his motion for judgment of acquittal on counts one, three, and six of the indictment.[1] We review a trial court's ruling on such a motion de novo. *State v. West*, 226 Ariz. 559, ¶ 15 (2011). Pursuant to Rule 20(a)(1), Ariz. R. Crim. P., after the close of evidence, "the court must enter a judgment of acquittal on any offense charged in an indictment . . . if there is no substantial evidence to support a conviction." Substantial evidence is that which a reasonable juror could accept as sufficient to support a conclusion of guilt beyond a reasonable doubt. *State v. Fulminante*, 193 Ariz. 485, ¶ 24 (1999). On appeal, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have

[1]Gill does not contest his convictions or sentences for counts four and five, the other possession-of-paraphernalia charges.

found the essential elements of the crime beyond a reasonable doubt." *State v. Cox*, 214 Ariz. 518, ¶ 8 (App. 2007) (emphasis omitted) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

Count One – Possession of Methamphetamine

¶7 Gill challenges his conviction for possession of methamphetamine, the lesser-included offense of count one, which required proof that he knowingly possessed methamphetamine, a dangerous drug. A.R.S. §§ 13-3401(6)(c)(xxxviii), 13-3407(A)(1). "Possession" means a person "knowingly exercised dominion or control over property," A.R.S. § 13-105(35), and it may be actual or constructive, *State v. Gonsalves*, 231 Ariz. 521, ¶ 9 (App. 2013). While actual possession means a defendant "knowingly exercised direct physical control over an object," *id.*, constructive possession means he either exercised dominion and control over the drug itself, "or the location in which the substance was found," *State v. Teagle*, 217 Ariz. 17, ¶ 41 (App. 2007). However, "a person's mere presence at a location where a prohibited item is located is insufficient to show that he . . . knowingly exercised dominion or control over it." *Gonsalves*, 231 Ariz. 521, ¶ 10. Rather, the state must show such constructive possession by "specific facts or circumstances." *Id.* (quoting *State v. Villalobos Alvarez*, 155 Ariz. 244, 245 (App. 1987)).

¶8 Gill argues that his possession of the methamphetamine was not proved because "no evidence" corroborated his admission that he possessed "less than a quarter gram" of methamphetamine within the residence, citing the corpus delicti doctrine. That principle "ensures that a defendant's conviction is not based upon an uncorroborated confession or incriminating statement." *State v. Morris*, 215 Ariz. 324, ¶ 34 (2007). Here, however, there was considerable evidence corroborating Gill's admission and supporting his conviction. In the area of the residence with Gill's possessions, police found a methamphetamine pipe and a bag containing a syringe. A few steps from that area was the red and black bag containing methamphetamine and various drug paraphernalia including packaging seals, syringes, and another methamphetamine pipe. Accordingly, there was substantial evidence in addition to Gill's incriminating statements from which a jury could find beyond a reasonable doubt that he had possessed methamphetamine found in the residence. *See Cox*, 214 Ariz. 518, ¶ 8; § 13-3407(A)(1).

Count Three – Possession of Paraphernalia

¶9 Gill next contends there was insufficient evidence that he knowingly possessed, with the intent to use, the white scale underlying one of his paraphernalia convictions. *See* A.R.S. § 13-3415(A). He argues the scale was not found in his sleeping area of the residence, there was "no evidence linking him to the scale, no fingerprints or DNA and no evidence that he ever used the scale to weigh drugs," and his mere presence in the vicinity of the scale is insufficient to sustain the conviction. We disagree for several reasons.

¶10 First, a lack of fingerprints or DNA is hardly determinative, as a conviction "may rest solely" on circumstantial evidence. *State v. Nash*, 143 Ariz. 392, 404 (1985). Gill admitted to police that he traded drugs "back and forth" and a "couple people" had asked him for heroin or methamphetamine hours before the residence was searched. An experienced narcotics detective testified that drug dealers often use small scales for measuring the weight of drugs for drug transactions. Gill argues the scale "could just as easily have belonged to, or been used by" one of the other residents. But even if the scale, in plain view in the common area of the small house in which Gill resided, was also used or possessed by other residents, that would not negate Gill's possession under the circumstances here. *See State v. Jenson*, 114 Ariz. 492, 493-94 (1977) (drugs found in hallway of shared apartment constructively possessed by defendant notwithstanding dominion and control of premises by others); *State v. Murphy*, 117 Ariz. 57, 61-62 (1977) (defendant possessed drugs found "in obvious places around the apartment where a person living in the apartment would have knowledge of their presence").

¶11 Viewing the evidence in the light most favorable to affirming Gill's convictions, as we are required to do, *West*, 226 Ariz. 559, ¶ 15, we do not reweigh the evidence or resolve inferences in his favor, *State v. Lee*, 189 Ariz. 590, 603 (1997). Based on Gill's admissions that he was engaged in trading drugs, the discovery of drugs near his living space, those drugs being of the type typically transferred in small quantities by weight, and the scale being found in the open common area of the residence, substantial evidence supports his conviction for its possession. *See Cox*, 214 Ariz. 518, ¶ 8; § 13-3415(A).

Count Six – Use of Building for Drug Trafficking

¶12 Gill also challenges the sufficiency of the evidence for count six, which required proof that he intentionally used the house "for the

purpose of unlawfully selling, manufacturing or distributing" methamphetamine or heroin. A.R.S. §§ 13-3401(6)(c)(xxxviii), (20)(ttt), (21)(m), 13-3421(A). Although Gill concedes that methamphetamine and heroin were being sold or distributed from the residence on the day of his arrest, he argues the evidence did not establish that he "was the individual who sold drugs . . . from the . . . residence or that he had constructive possession of the drugs" sold that day and therefore could not be convicted of violating § 13-3421(A).

¶13 Section 13-3421(A) provides, "A person who as a lessee or occupant intentionally uses a building for the purpose of unlawfully selling, manufacturing or distributing any dangerous drug or narcotic drug is guilty of a class 6 felony." When interpreting a statute, we look first to its plain language as the most reliable indicator of its meaning. *State v. Givens*, 206 Ariz. 186, ¶ 5 (App. 2003). When the language is clear, we follow the text as written. *Id.*

¶14 Gill asserts that because the statute employs the word "uses," which is an "action verb," the offense therefore requires "an act beyond intent such as the actual sale of drugs, or the actual manufacture of drugs or the actual distribution of drugs." The state disagrees, arguing that a completed drug sale is not an element of the offense, but rather it is a defendant's demonstrated purpose in using the building that is the operative factor. We conclude that the plain language of the statute supports the state's view.

¶15 Section 13-3421(A) requires only that the occupant intentionally use the building "for the purpose of" unlawful sale, manufacture, or distribution of a dangerous or narcotic drug; whether sale, manufacture, or distribution is actually accomplished is not addressed or otherwise mentioned. Thus, a straightforward reading of the statute is that the "act beyond intent" is using the building. Significantly, one could make use of a house for all of the preparatory steps of selling a narcotic drug, such as receiving and storing the drug, and contacting potential buyers, but not actually accomplish any sale or distribution. Or, as relevant here, a person could use a residence for receiving potential buyers, maintaining paraphernalia for weighing and packaging drugs, and as a pickup location for drugs. Whether or not there was a sale or distribution, however, would not necessarily affect the "use" of the premises for the prohibited purpose. *Cf. State v. Escalante*, 245 Ariz. 135, ¶ 42 (2018) (person commits possession of drug paraphernalia if possessed with intent to use it); *State v. Cook*, 139 Ariz. 406, 408 (App. 1984) (upholding statute proscribing act of being in a public place combined with purpose of prostitution); *State ex rel. Williams v.*

City Court of Tucson, 21 Ariz. App. 489, 493 (1974) (legislature may prohibit intent "so long as there is an overt act combined with such intent"). Finally, adoption of Gill's theory would require adding to the statute an element not included by the legislature, something we will not do. *See State v. Cheramie*, 218 Ariz. 447, ¶ 9 (2008) ("The legislature defines crimes and their elements, and '[c]ourts may not add elements to crimes defined by statute.'" (quoting *State v. Miranda*, 200 Ariz. 67, ¶ 5 (2001)) (alteration in *Cheramie*)).

¶16 Other states' courts considering similar "purpose" statutes have come to similar conclusions. *See Rose v. State*, 51 A.3d 479, 482-83 (Del. 2012) (possession of controlled substance not an element of maintaining a dwelling for keeping controlled substances); *Gipe v. State*, 466 A.2d 40, 46-47 (Md. Ct. Spec. App. 1983) (evidence of recurrent drug activities sufficient to support offense of keeping apartment for purpose of illegal distribution of drugs); *State v. Alston*, 373 S.E.2d 306, 310 (N.C. Ct. App. 1988) (evidence of drug possession and "numerous people stopping at the building for short times and then leaving" sufficient to sustain conviction for maintaining a building used for keeping or selling illegal drugs); *cf. People v. Parker*, 660 N.E.2d 1296, 1299-1300 (Ill. App. Ct. 1996) (statute criminalizing "permitting unlawful use of a building" not unconstitutionally vague); *State v. Davis*, 308 P.3d 807, ¶¶ 19, 22 (Wash. Ct. App. 2013) (holding "drug house" statute criminalizing "use of a building for drug purposes" not unconstitutionally vague).

¶17 Gill further contends the evidence was insufficient to sustain his conviction because there was no testimony that he had been seen selling or distributing drugs, none of the individuals in the vehicles stopped that day had identified him as the seller or distributor, no evidence of sales had been found in his sleeping area of the residence, and no evidence had directly linked him to the indicia of sales found in the common areas. But eyewitness testimony that Gill was using the residence to sell or distribute methamphetamine or heroin was not necessary. Gill's admission to police that he had traded drugs "back and forth," that a "couple people" had asked him for either heroin or methamphetamine the day of his arrest, *see* A.R.S. § 13-3401(32) ("Sell" means "an exchange for anything of value or advantage, present or prospective."), and that he was aware drugs were sold at the house, was direct evidence supporting his conviction. *See State v. Morgan*, 204 Ariz. 166, ¶ 17 (App. 2002) (A corroborated confession "may be used to establish proof of an element of the crime."). We thus disagree that Gill's conviction "was based on speculative inferences [that] were not drawn on probative facts." The salient facts are detailed above, and, again, resolving all reasonable inferences against him, we conclude the state

presented sufficient evidence that Gill used the residence for the purpose of unlawfully distributing dangerous or narcotic drugs. *See* § 13-3421(A).

¶18 Lastly, Gill again asserts that no corroborating evidence supported his confession, and therefore his conviction "was fundamentally unfair and . . . in violation of the Due Process Clause of the Fourteenth Amendment." We reject that claim because there was considerable circumstantial evidence upon which the jury could rely aside from Gill's admissions. *See State v. Bible*, 175 Ariz. 549, 560 n.1 (1993) (no distinction between probative value of direct and circumstantial evidence). In addition to the evidence of methamphetamine near, and the paraphernalia found within, Gill's living area as described above, there had been constant traffic to the house with brief visitors, which expert testimony described as indicative of drug trafficking; on March 6, 2018, police had stopped several vehicles leaving the residence with methamphetamine and heroin; multiple scales and plastic seals, used to weigh and package drugs, were found throughout the residence, *cf. State v. Cornman*, 237 Ariz. 350, ¶ 22 (App. 2015) (defendant's admission that he sold methamphetamine corroborated by presence of drug scales); the house had both interior and exterior cameras with live feeds to a video monitor set up in Gill's partition; and there was testimony indicating that Gill was the "primary resident" and lessee of the house. Thus, there was ample evidence supporting Gill's conviction for prohibited use of the premises, and his claims to the contrary are without merit. Accordingly, the trial court correctly denied Gill's motion for judgment of acquittal. *See Cox*, 214 Ariz. 518, ¶ 8.

Disposition

¶19 For the foregoing reasons, Gill's convictions and sentences are affirmed.