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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. BRIAN SHALOM HUNTER, Appellant.	2 CA-CR 2011-0090 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20082451

Honorable Teresa Godoy, Judge Pro Tempore
Honorable Richard S. Fields, Judge

AFFIRMED IN PART; VACATED IN PART

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E C K E R S T R O M, Presiding Judge.

¶1 Following a jury trial, appellant Brian Hunter was convicted of two counts of selling or transferring a narcotic drug, one count of possessing a narcotic drug for sale, and one count of possessing drug paraphernalia. The trial court determined Hunter had two historical prior felony convictions and imposed concurrent prison sentences totaling fourteen years. On appeal, Hunter argues the court erred by admitting certain testimony relating to his alias, taking judicial notice of information he had provided in a court document, and denying his requested jury instruction relating to his mere presence defense. Hunter also contends certain convictions were multiplicitous (counts four and five) and others were based on insufficient evidence (counts five and six). We reject these arguments and affirm his convictions and sentences, except that we vacate the criminal restitution order erroneously entered at sentencing.[1]

Factual and Procedural Background

¶2 We generally view the evidence presented below in the light most favorable to sustaining the verdicts. *State v. Blakley*, 226 Ariz. 25, ¶ 2, 243 P.3d 628, 629 (App. 2010). Hunter was charged with six drug offenses based on a series of drug sales to an

[1]Although this court has granted Hunter's latest motion to allow hybrid representation and has permitted him to file his own "supplemental memorandum" in this appeal, we have since determined that our ruling on that motion was improvident. Hunter has received court-appointed counsel for this appeal, and his attorney has raised substantive issues in a brief properly filed with this court. "A prisoner does not have a right to file pro se pleadings while represented by counsel." *Hutchinson v. Florida*, 677 F.3d 1097, 1107 (11th Cir. 2012); *accord McMeans v. Brigano*, 228 F.3d 674, 684 (6th Cir. 2000); *United States v. Gwiazdzinski*, 141 F.3d 784, 787 (7th Cir. 1998). "[I]t is counsel, not the client, who decides which issues to raise" on appeal, consistent with counsel's professional judgment and ethical obligations. *State v. Alford*, 157 Ariz. 101, 103, 754 P.2d 1376, 1378 (App. 1988). We therefore disregard the issues Hunter has attempted to raise on his own behalf.

undercover police detective, Christina Hearn, and a resulting search of his apartment pursuant to a warrant.

¶3 Counts one and two alleged Hunter had sold or transferred cocaine base, a narcotic drug, on two different days in April 2008. Detective Hearn testified that her investigation began that month after she received "a phone number that was associated with . . . Brian Hunter, also known as Goldie, who was suspected of selling crack cocaine." The detective called Goldie at the number provided and arranged to meet "his driver" at a gasoline station to buy narcotics. There, she met Hunter's codefendant Alan Culver, and she twice purchased "crack cocaine" from him.[2]

¶4 Count three alleged Hunter had sold or transferred cocaine base on May 16, 2008. On this day, detective Hearn again called Goldie using the same telephone number and arranged to meet him at a different gas station. This time, Hunter drove to the gas station in a convertible, and he personally sold cocaine base to the detective while another man sat in the back seat of the vehicle. The detective testified that during this encounter she recognized Hunter as Goldie from his voice.

¶5 Count four alleged Hunter had sold or transferred cocaine base on June 19, 2008. On that day, Detective Hearn called Goldie using the same number and arranged to purchase narcotics at an apartment. Hearn was still connected on a call to Goldie as she approached the apartment, and, once there, she saw Hunter outside talking to her on the telephone; she then followed him into the apartment. Hunter sat on a couch in the living room of the one-bedroom apartment, and he told the detective that the cocaine she

[2]Culver pled guilty prior to trial.

wanted was on the living room table. The detective gave Hunter a $100 bill and left with the bag of narcotics.

¶6 Count five alleged Hunter had possessed cocaine base for sale on June 19, 2008, and count six alleged that on the same date he had possessed drug paraphernalia described as "a scale and/or baggies and/or pill bottles." As Hunter acknowledges in his opening brief, these two charges were based on evidence seized from the same apartment later that day, after the sale to Detective Hearn had already occurred. Inside the apartment, law enforcement officers discovered cash hidden beneath a cushion of the living room couch; they found a plastic pill bottle containing cocaine base in the pocket of a jacket hanging in the living room closet; and they discovered more cash, pill bottles, and cocaine base in the kitchen cabinets, along with a digital scale and small plastic bags. Officers learned the apartment was leased to Alan Culver, but they discovered utility bills to the residence in Hunter's name. Hunter also had told Detective Hearn that he usually could be found in the apartment between 10:00 and 11:00, and he possessed a key to it that officers observed him use.

¶7 The jury failed to return a verdict on counts one and two, and the trial court later dismissed these charges with prejudice. The jury found Hunter guilty of counts three through six, and the court sentenced him to concurrent terms of imprisonment, as noted above. After his first appeal was dismissed as untimely, Hunter obtained leave from the trial court to file a delayed notice of appeal pursuant to Rule 32.1(f), Ariz. R. Crim. P. We have jurisdiction over the current appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 13-4033(A)(1) and (4).

Discussion

Alias

¶8 Hunter first contends the trial court "denied his due process right to a fair trial" when it refused to strike testimony from another detective, Brett Barber, that he had "kn[own Hunter] as Goldie for years." The comment was made when defense counsel asked the detective about the audio recording of Hunter's post-arrest interview that had been played for the jury:

> Q: . . . [Y]ou asked him, Mr. Hunter, the question, you are Goldie you heard that; right?
>
> A: Yes.
>
> Q: And there's no answer there, but he shook his head when you asked him that question; correct?
>
> A: You know, to be honest with you, sir, I don't remember him shaking his head, but I kn[e]w him as Goldie.
>
> Q: Well, he didn't admit to you when you asked him directly right then, right, that he was Goldie; correct?
>
> A: He didn't say it out loud, but I kn[e]w him as Goldie for years, sir.

Hunter objected and moved to strike the last portion of the testimony on the grounds that it was nonresponsive and "just totally prejudicial." The trial court denied the request, given the entire context and the way the questions were asked, but the court acknowledged the detective had "said something he didn't need to" in response to counsel's specific questions.

¶9 On appeal, Hunter maintains this testimony constituted other-act evidence that should have been ruled inadmissible pursuant to Rule 404(b), Ariz. R. Evid. The state argues, and we agree, that Hunter failed to make a specific objection preserving the Rule 404(b) argument he now presents on appeal. *See State v. Rutledge*, 205 Ariz. 7, ¶¶ 29-30, 66 P.3d 50, 56 (2003) (requiring objection on specific legal ground to preserve issue for appeal); *State v. Montano*, 204 Ariz. 413, ¶ 58, 65 P.3d 61, 73 (2003) (same). We therefore review this aspect of the argument only for fundamental, prejudicial error. *State v. Lopez*, 217 Ariz. 433, ¶¶ 4, 7, 175 P.3d 682, 683-84 (App. 2008).

¶10 We agree with Hunter, however, that his objection to the "prejudicial" nature of the detective's testimony was adequate to present an argument under Rule 403, Ariz. R. Evid., even though he failed to describe what "unfair prejudice" would warrant excluding the evidence under this rule. *See Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d at 683 (requiring ground for objection to be specifically stated or apparent from context); *see also State v. Schurz*, 176 Ariz. 46, 52, 859 P.2d 156, 162 (1993) (noting "the word 'prejudicial' . . . is inexact" with respect to class of evidence excluded by Rule 403). This rule allows a court to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice," meaning the risk of "'decision on an improper basis.'" *Schurz*, 176 Ariz. at 52, 859 P.2d at 162, *quoting* Fed. R. Evid. 403 advisory committee note. "Because the trial court is best situated to conduct the Rule 403 balance, we will reverse its ruling only for abuse of discretion." *State v. Cañez*, 202 Ariz. 133, ¶ 61, 42 P.3d 564, 584 (2002).

¶11 Here, Detective Barber's testimony was properly admitted because the identity of Goldie was a contested issue in the case that provided the impetus for defense counsel's questions. Under our state evidentiary rules, like the analogous federal rules, evidence of a defendant's alias or nickname is admissible if it "aids in the identification of the defendant or in some other way directly relates to the proof of the acts charged in the indictment." *United States v. Williams*, 739 F.2d 297, 299 (7th Cir. 1984); *see State v. Correll*, 148 Ariz. 468, 474, 715 P.2d 721, 727 (1986). Hunter does not dispute that the detective's testimony here was relevant and probative identification evidence; he merely argues "the testimony could have been elicited in a less prejudicial manner, so as not to suggest [Hunter]'s prior criminal contact with law enforcement." We are not persuaded on this point.

¶12 Detective Barber did not expressly state that Hunter had prior criminal contacts with law enforcement officers, nor did the detective elaborate on the source of his knowledge. Instead, he offered a sanitized presentation of highly probative evidence on a topic already addressed by Detective Hearn. The challenged testimony "was not unfairly prejudicial" but "was adversely probative in the sense that all good relevant evidence is." *Schurz*, 176 Ariz. at 52, 859 P.2d at 162. We thus find no error and no abuse of discretion in the court's refusal to strike the testimony.

Judicial Notice

¶13 Hunter next contends the trial court erred by taking judicial notice of his telephone number. At trial, the state presented evidence that the police first contacted Hunter using the telephone number for Goldie, which was 358-9094. On the financial

affidavit Hunter had filed in this case to receive court-appointed counsel, he provided the same number as his own telephone number. When defense counsel asked questions during trial suggesting this telephone number belonged to someone else, the court informed counsel of the financial affidavit in the court's file, and it later granted the state's motion to take judicial notice of this document pursuant to Rule 201, Ariz. R. Evid.

¶14 The trial court overruled Hunter's objection based on nondisclosure under Rule 15, Ariz. R. Crim. P., and instructed the jury as follows:

> [T]he State has asked [the] Court to take judicial notice of a document that's contained in the court['s] file for Mr. Hunter.
>
> Now, this is a document that courts require people who are accused of a crime to fill out. This document is a document by Mr. Hunter. This is a document filled out under the pains and penalties of perjury. In other words, they affirm the information in the document is true.
>
> In this document Mr. Hunter lists a phone number of 358-9094. . . . This document is signed and it is dated July the 9th, 2008.

¶15 "The superior court may properly take judicial notice of its own records," *State v. Camino*, 118 Ariz. 89, 90, 574 P.2d 1308, 1309 (App. 1977), and Hunter does not dispute this point on appeal. Instead, he contends the trial court committed fundamental error by failing to inform jurors "that the judicial notice was not a conclusive presumption" and that they could either accept or reject this evidence. Because he failed to object to the court's instructions on these grounds below, Hunter must establish that the alleged error was fundamental and resulted in prejudice. *See State v. Hargrave*, 225

Ariz. 1, ¶ 26, 234 P.3d 569, 578-79 (2010); *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005). We review a court's instructions as a whole to determine whether they have misled the jury. *See State v. Dann*, 220 Ariz. 351, ¶ 51, 207 P.3d 604, 616-17 (2009); *State v. Gallegos*, 178 Ariz. 1, 10, 870 P.2d 1097, 1106 (1994).

¶16 We find no prejudice in the instructions here, as they neither conclusively determined any factual issue nor otherwise disparaged Hunter's fundamental rights. The trial court properly instructed the jurors that they were the sole fact-finders and that the court's instructions provided the only law relevant to the case. Jurors are presumed to follow a court's instructions. *State v. Velazquez*, 216 Ariz. 300, ¶ 50, 166 P.3d 91, 103 (2007). It is of no moment, therefore, that the former Rule 201(g) applicable during trial required courts to advise jurors "to accept as conclusive any fact judicially noticed." 115 Ariz. XXX, XXXIV (1977). The jury was never so instructed. And, although the court did not expressly inform the jury that "it may or may not accept the noticed fact as conclusive," as is now required under the amended Rule 201(f),[3] this fundamental power of the jury was apparent from the court's instructions as a whole. Accordingly, we find no prejudice from the instructions related to the financial affidavit.

¶17 Hunter further contends, as he did below, that the state failed to disclose the financial affidavit pursuant to Rule 15.1, and he suggests the trial court abused its discretion by taking judicial notice of the document notwithstanding the state's failure. We reject this argument for two reasons. First, under both the prior and current version of Rule 201(c), a court may take judicial notice *sua sponte*. *See* Ariz. Sup. Ct. Order No.

[3]Ariz. Sup. Ct. Order No. R-10-0035, at 9-10 (Sept. 8, 2011).

R-10-0035, at 9 (Sept. 8, 2011); 115 Ariz. XXXIV (1977). Because judicial notice does not depend upon a party's request, it follows *a fortiori* that it does not depend upon a party's disclosure of a court document.

¶18 Second, a trial court has discretion in selecting a sanction for a disclosure violation, including no sanction at all. *State v. Moody*, 208 Ariz. 424, ¶ 114, 94 P.3d 1119, 1149 (2004). Contrary to Hunter's suggestion, a disclosure violation does not automatically result in the preclusion of evidence. Rule 15.6(d) provides that a trial court "may . . . grant a reasonable extension to complete the disclosure and leave to use the material or information." *Cf. State v. LaBarre*, 115 Ariz. 444, 448 n.2, 565 P.2d 1305, 1309 n.2 (App. 1977) (failure to disclose witness does not automatically preclude testimony; testimony generally may be admitted when opposing party given opportunity to meet and question witness). "Precluding evidence is rarely an appropriate sanction," and a court does not abuse its discretion by denying this sanction when the court "believes the defendant will not be prejudiced." *State v. Towery*, 186 Ariz. 168, 186, 920 P.2d 290, 308 (1996).

¶19 Assuming arguendo that a party must disclose a court document intended to be used as evidence, the record here does not clearly show whether the prosecutor had the financial affidavit within his "possession or control," making it subject to disclosure under Rule 15.1(b) or (f), before the court alerted defense counsel to this document during trial. *See generally Rivera-Longoria v. Slayton*, 228 Ariz. 156, ¶¶ 6-8, 14, 264 P.3d 866, 867-68, 869 (2011) (discussing state's disclosure obligations). Furthermore, defense counsel had equal access to this court document, if not actual possession of it,

before judicial notice was taken. Although Hunter asserts the lack of disclosure resulted in prejudice and impaired his ability to prepare a defense, he has failed to explain how his defense was prejudiced. Hunter knew the telephone number would be an issue at trial, and the court offered a "sanitize[d]" presentation of the financial affidavit that alerted the jury only to its probative and uncontested facts. We therefore do not find the court abused its discretion in overruling Hunter's objection under Rule 15.

Mere Presence Instruction

¶20 Hunter next contends the trial court erred and denied his "federal constitutional right to a jury determination of the facts" when it refused his request for a "mere presence" instruction taken from the Revised Arizona Jury Instructions (RAJI). Although the court indicated it had received a facsimile of Hunter's proposed instruction, the parties have failed to inform this court whether and where this document can be found in the record on appeal. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi), (c)(2) (requiring briefs to include record citations for each legal argument); *see also* Ariz. R. Crim. P. 21.2 (requiring proposed instructions to be submitted in writing). Nevertheless, the state asserts that Hunter sought the following instruction below:

> Guilt cannot be established by the defendant's mere presence at a crime scene, mere association with another person at a crime scene or mere knowledge that a crime is being committed. The fact that the defendant may have been present, or knew that a crime was being committed, does not in and of itself make the defendant guilty of the crime charged. One who is merely present is a passive observer who lacked criminal intent and did not participate in the crime.

State Bar of Arizona, *RAJI (Criminal)* Std. 31 (3d ed. 2011). We accept the state's concession that Hunter properly requested this instruction. We therefore review the court's ruling for an abuse of discretion. *See State v. Rosas-Hernandez*, 202 Ariz. 212, ¶ 31, 42 P.3d 1177, 1185 (App. 2002).

¶21 "A party is entitled to an instruction on any theory reasonably supported by the evidence." *State v. Rodriguez*, 192 Ariz. 58, ¶ 16, 961 P.2d 1006, 1009 (1998). When making this assessment, the question is whether the evidence, viewed in the light most favorable to the proponent, supports giving the instruction. *State v. King*, 225 Ariz. 87, ¶ 13, 235 P.3d 240, 243 (2010). Under this standard, a court does not weigh the evidence or resolve conflicts in it; the court merely decides whether the record provides evidence "upon which the jury could rationally sustain the defense." *State v. Strayhand*, 184 Ariz. 571, 587-88, 911 P.2d 577, 593-94 (App. 1995). In this respect, the sufficiency test for a jury instruction is similar to that for a verdict under Rule 20, Ariz. R. Crim. P. *See State v. West*, 226 Ariz. 559, ¶¶ 16, 18, 250 P.3d 1188, 1191, 1192 (2011).

¶22 Another similarity is that a jury instruction must be based on "more than pure speculation and conjecture." *State v. Curtis*, 114 Ariz. 527, 530, 562 P.2d 407, 410 (App. 1977). As *Strayhand* illustrates, the basis for a mere presence instruction should "appear in the record." 184 Ariz. at 587, 911 P.2d at 593. An instruction is not required simply because, "as a theoretical matter, 'the jury might . . . disbelieve the state's evidence.'" *State v. Wall*, 212 Ariz. 1, ¶ 18, 126 P.3d 148, 151 (2006), *quoting State v. Caldera*, 141 Ariz. 634, 637, 688 P.2d 642, 645 (1984); *accord State v. Cookus*, 115 Ariz. 99, 104-05, 563 P.2d 898, 903-04 (1977). Thus, a mere presence instruction is

unwarranted when there is overwhelming evidence of the defendant's guilt and active participation in a crime, coupled with an utter dearth of evidence showing the offense was committed by another party. *See, e.g.*, *State v. Doerr*, 193 Ariz. 56, ¶ 36, 969 P.2d 1168, 1177 (1998). Such is the situation here.

¶23 On appeal, Hunter only contends the mere presence instruction was required with respect to count three, which involved him selling narcotics to Detective Hearn when another person was sitting in Hunter's car. Regarding this count, the detective testified she had met Hunter at a gas station and had knelt down to have a conversation with him "at the driver's side window—or driver's side door" of the convertible he was driving. Hunter told the detective to take a small bag of drugs from the driver's side door panel. She then reached in and removed a bag of cocaine base, leaving a $100 bill in its place. On this record, the trial court concluded a mere presence instruction would be inappropriate because Hunter was more than a passive observer; "the evidence show[ed] that [he] was the only participant."

¶24 Hunter does not meaningfully challenge this determination on appeal. He simply maintains "[t]he jury could have disbelieved" the detective's testimony and instead could have "believed . . . the other male in the back seat[] arranged for the transaction." Such speculation and conjecture, however, do not provide an evidentiary basis for an instruction. Moreover, even if the other passenger somehow had "arranged for the transaction," as Hunter now claims, it is unclear how this would have provided a legal defense, given Hunter's own involvement in the sale. *See Strayhand*, 184 Ariz. at 587, 911 P.2d at 593 ("A defendant is entitled to an instruction on any theory of defense

which is recognized by law and supported by the evidence."). We therefore find no error and no abuse of discretion in the court's refusal to give a mere presence instruction.

Multiplicity

¶25 Hunter further argues his convictions on counts four (sale or transfer of a narcotic drug) and five (possession of a narcotic drug for sale) are "multiplicitous, violating double jeopardy." "Charges are multiplicitous if they charge a single offense in multiple counts." *Merlina v. Jejna*, 208 Ariz. 1, ¶ 12, 90 P.3d 202, 205 (App. 2004). Both these offenses occurred on the same day and involved cocaine base Hunter possessed for sale in the same apartment, as he notes in his opening brief. Nevertheless, the trial court determined these charges were not multiplicitous because they involved "separate events" and "separate quantities of [the] alleged narcotic drug." We review de novo questions of multiplicity and double jeopardy, *see State v. Brown*, 217 Ariz. 617, ¶¶ 7, 12, 177 P.3d 878, 881, 882 (App. 2008), and we agree with the trial court's ultimate conclusion.

¶26 Convictions are not multiplicitous when they involve separate and distinct acts or courses of conduct. *See State v. Via*, 146 Ariz. 108, 116, 704 P.2d 238, 246 (1985). Separate drug convictions, in particular, do not run afoul of the Fifth Amendment's Double Jeopardy Clause when the evidence presented at trial shows "'acts of possession and distribution involv[ing] discrete quantities of narcotics.'" *United States v. Kennedy*, 682 F.3d 244, 257 (3d Cir. 2012), *quoting United States v. Carter*, 576 F.2d

1061, 1064 (3d Cir. 1978).[4] Thus, as the state points out, "the sale and possession of the same drug can be punished separately if the sale consumes only part of a defendant's entire inventory of drugs." *People v. Barger*, 40 Cal. App. 3d 662, 672 (1974); *accord In re Adams*, 122 Cal. Rptr. 73, 76 (1975).

¶27 Here, count four was based on the cocaine base Hunter actually sold to Detective Hearn for $100 in his apartment, whereas count five was based on Hunter's possession of other cocaine base in the residence. The cocaine sold to the detective was contained in a plastic bag lying in plain view on the living room table; the other cocaine was stored in a kitchen cabinet, much of it inside a plastic pill bottle, as well as inside a pill bottle in the pocket of a jacket hanging in a closet. Given the separate packaging and locations of the drugs, a conviction on one charge would not logically require a conviction on the other. "The facts required to prove the two offenses differ[ed]," *Carter*, 576 F.2d at 1064, reflecting that these were, in fact, separate and distinct offenses.

¶28 Hunter's reliance on *State v. Cheramie*, 218 Ariz. 447, 189 P.3d 374 (2008), is misplaced, as that case is distinguishable from the situation here. *Cheramie* held that possession of a dangerous drug is a lesser-included offense of transportation of a dangerous drug for sale when both offenses are based on the same quantity of the drug. *Id.* ¶¶ 1-2. The reason for this rule is that it is impossible in such a scenario to commit a

[4]Although Hunter presents an argument only under the federal constitution, we note that our state constitution's prohibition on double jeopardy is generally given the same interpretation. *See State v. McPherson*, 228 Ariz. 557, ¶ 5, 269 P.3d 1181, 1183-84 (App. 2012).

transportation offense without also committing a possession offense. *Id.* ¶¶ 9-10; *see also State v. Chabolla-Hinojosa*, 192 Ariz. 360, ¶¶ 1, 8, 965 P.2d 94, 95, 96 (App. 1998) (holding "a conviction of possessing for sale the same marijuana one is convicted of transporting for sale violates the double jeopardy clause" by separately punishing defendant for lesser-included offense). Here, the bag of narcotics Hunter sold to Detective Hearn in the apartment did not form the basis of both counts four and five, which would be constitutionally prohibited. Rather, count five was based on Hunter's possession of other unsold narcotics, and, consequently, it was not a lesser-included offense of count four. Hunter's observation that he once possessed all the narcotics "contemporaneous[ly]" is irrelevant to the constitutional analysis. The challenged convictions are not multiplicitous.

Sufficiency of Evidence

¶29 Last, Hunter contends there was insufficient evidence to conclude he had "dominion and control over [the] contents of the apartment," specifically the narcotics and drug paraphernalia found during the search that form the basis of counts five and six, respectively. In support of this argument, he points to the lease suggesting the apartment and its illicit contents belonged to Alan Culver. Hunter maintains he "did not have the authority to enter" the areas where the contraband was found and thus could not have been found guilty of possession.

¶30 We review the sufficiency of the evidence de novo. *West*, 226 Ariz. 559, ¶ 15, 250 P.3d at 1191. The test for sufficiency is whether the evidence, when viewed in the light most favorable to the prosecution, would allow a rational trier of fact to find all

the elements of the offense beyond a reasonable doubt. *Id.* ¶ 16; *State v. Cox*, 217 Ariz. 353, ¶ 22, 174 P.3d 265, 269 (2007). It is the jury's role to weigh the evidence and resolve any conflicts within it. *See Cox*, 217 Ariz. 353, ¶ 27, 174 P.3d at 269; *State v. Gay*, 108 Ariz. 515, 517, 502 P.2d 1334, 1336 (1972). On appeal, therefore, "we resolve all conflicts in the evidence against [the] defendant," *State v. Bustamante*, 229 Ariz. 256, ¶ 5, 274 P.3d 526, 528 (App. 2012), and we do not reweigh the evidence to determine its sufficiency. *State v. Tucker*, 231 Ariz. 125, ¶ 27, 290 P.3d 1248, 1261 (App. 2012). By these standards, sufficient evidence of guilt exists "if reasonable minds can differ on inferences to be drawn" from the evidence. *State v. Landrigan*, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993). Thus, we will not disturb a verdict of guilt unless there is "'a complete absence of probative facts to support the conviction.'" *State v. Sharma*, 216 Ariz. 292, ¶ 7, 165 P.3d 693, 695 (App. 2007), *quoting State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996).

¶31 Both of the challenged offenses here required the state to prove the element of knowing possession. *See* A.R.S. §§ 13-105(34), (35), 13-3408(A)(2), 13-3415(A).[5] Possession may be either physical or constructive. *State v. Butler*, 230 Ariz. 465, ¶ 10, 286 P.3d 1074, 1078 (App. 2012). Constructive possession may be established by direct or circumstantial evidence showing that the defendant knew of the contraband's existence and exercised dominion and control over it or over the area where it was found. *State v.*

[5]We cite the current versions of these statutes, as their relevant provisions have not been substantively changed since Hunter's 2008 offenses.

Cox, 214 Ariz. 518, ¶ 10, 155 P.3d 357, 359 (App.), *aff'd*, 217 Ariz. 353, 174 P.3d 265 (2007).

¶32 Here, the evidence allowed a rational juror to infer Hunter had knowingly possessed the drugs and paraphernalia found in the apartment, notwithstanding the conflicting evidence of ownership. As Hunter acknowledges, utility bills to the apartment were found in his name. Hunter also had a key to the apartment and locked its door upon leaving. Furthermore, he completed a drug transaction in the apartment with Detective Hearn, and he told her he usually could be found there for one hour every day. This evidence allowed the jury to reasonably conclude that Hunter used the apartment for drug sales and that he knew of and constructively possessed the illegal items found inside. *Cf. Butler*, 230 Ariz. 465, ¶ 11, 286 P.3d at 1078-79 (finding sufficient evidence defendant constructively possessed firearm located in house he stayed in for one hour and used for marijuana trafficking). In sum, sufficient evidence supported the convictions on counts five and six.

Criminal Restitution Order

¶33 In disposing of the issues previously discussed, we have observed that the trial court erroneously entered a criminal restitution order (CRO) at sentencing, which constitutes fundamental error. *See State v. Lewandowski*, 220 Ariz. 531, ¶¶ 4, 15, 207 P.3d 784, 786, 789 (App. 2009); *see also State v. Musgrove*, 223 Ariz. 164, ¶ 4, 221 P.3d 43, 45 (App. 2009) (appellate court "will not ignore fundamental error if it sees it"). Although the trial court specified that "no interest, penalties, or collection fees" would accrue pursuant to the CRO while the defendant was incarcerated, the order is

nonetheless unauthorized and prejudicial, as we recently explained in *State v. Lopez*, 658 Ariz. Adv. Rep. 4, ¶¶ 1, 5 (Ct. App. Apr. 8, 2013).

Disposition

¶34 For the foregoing reasons, the criminal restitution order is vacated. Otherwise, Hunter's convictions and sentences are affirmed.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Michael Miller
MICHAEL MILLER, Judge