IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

WILLIAM LAROY DAVIS,
Appellant.

No. 2 CA-CR 2013-0345
Filed January 12, 2015

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Cochise County
No. CR201200366
The Honorable John F. Kelliher Jr., Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Robert A. Walsh, Assistant Attorney General, Phoenix
Counsel for Appellee

Gail Gianasi Natale, Phoenix
Counsel for Appellant

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Miller and Judge Espinosa concurred.

E C K E R S T R O M, Chief Judge:

¶1 After a jury trial, appellant William Davis was convicted of possession of a dangerous drug (methamphetamine) and two counts of possession of drug paraphernalia. He was sentenced to concurrent terms of imprisonment, the longest of which is 2.5 years. On appeal, Davis challenges the sufficiency of the evidence supporting his conviction for possessing methamphetamine and the admission of expert testimony from a police officer. We affirm for the reasons that follow.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to upholding the convictions, drawing all reasonable inferences against the defendant. *State v. Martinez*, 226 Ariz. 221, n.1, 245 P.3d 906, 907 n.1 (App. 2011). When Davis was being arrested for an unrelated offense, he reached into his pocket and dropped a coin-size plastic bag containing a substance that appeared to be methamphetamine. He eventually admitted it belonged to him.

¶3 A criminalist for the state testified that the substance in the bag was a mixture of methamphetamine and dimethyl sulfone, or MSM—an over-the-counter anti-inflammatory agent. MSM is a common "cutting agent" mixed with methamphetamine, because it has a similar appearance to methamphetamine and allows for greater profits in drug sales by diluting the product. As the sample was packaged, the criminalist opined that the mixture "would . . . be a usable quantity" of methamphetamine. He later stated on cross-examination that the methamphetamine in the bag "was not . . . a usable quantity." A police officer, C.B., subsequently testified that the 1.18-gram mixture in the bag represented a typical street-level quantity and usable amount of methamphetamine that could be

smoked in a pipe. The bag and the substance in it formed the basis of counts one and two of the indictment: possession of methamphetamine and drug paraphernalia, respectively.

¶4 When Davis was being processed in jail, a police officer discovered another coin-size plastic bag in Davis's clothing. It contained a powdery residue that laboratory tests revealed to be methamphetamine. This item formed the basis of the drug paraphernalia charge in count three.

¶5 At the close of the state's case, Davis moved for a judgment of acquittal on count one, arguing the methamphetamine he possessed did not constitute a usable quantity. The trial court denied Davis's motion and submitted the case to the jury. The court then denied his renewed motion filed after the jury had returned guilty verdicts on all charges. This appeal followed the imposition of sentence.

Discussion

¶6 Davis contends the trial court erred by denying his motions for judgment of acquittal under Rule 20, Ariz. R. Crim. P. A Rule 20 motion is designed to test the sufficiency of the evidence, *State v. Neal*, 143 Ariz. 93, 98, 692 P.2d 272, 277 (1984), and the same legal standard applies to pre- and post-verdict motions. *State v. West*, 226 Ariz. 559, ¶ 14, 250 P.3d 1188, 1191 (2011). The sole question is "whether the record contains 'substantial evidence to warrant a conviction.'" *Id.*, *quoting* Ariz. R. Crim. P. 20(a). Substantial evidence exists if, "'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.'" *Id.* ¶ 16, *quoting State v. Mathers*, 165 Ariz. 64, 66, 796 P.2d 866, 868 (1990).

¶7 When making this determination, we do not reweigh the evidence; its sufficiency is a question of law we review de novo. *Id.* ¶¶ 15-16. We will reverse a conviction for insufficient evidence pursuant to Rule 20 only if "there is a complete absence of probative facts to support a conviction." *Mathers*, 165 Ariz. at 66, 796 P.2d at 868. If reasonable people may fairly disagree about whether the

evidence establishes a fact at issue, such evidence is substantial and the resulting conviction must be upheld. *See State v. Rodriguez*, 192 Ariz. 58, ¶ 10, 961 P.2d 1006, 1008 (1998).

¶8 Here, Davis disputes only whether the evidence established he had possessed a usable quantity of methamphetamine. He concedes that having a usable quantity is not an element of the offense. *State v. Cheramie*, 218 Ariz. 447, ¶ 22, 189 P.3d 374, 378 (2008); *see* A.R.S. §§ 13-3401(6)(b)(xv), 13-3407(A)(1).[1] The instruction provided to the jury, however, stated otherwise.[2] Despite the fact that this instruction is outdated and erroneous, Davis maintains its effect was to raise the evidentiary bar for the state, requiring proof of a usable quantity of methamphetamine in order to secure a conviction.

¶9 We may assume without deciding that the defective instruction here, which was provided at the state's request and without objection, became the law of the case by which we must

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[1]Throughout this decision, we cite the versions of our criminal statutes in effect when Davis committed his offenses, in August 2010. *See* 2010 Ariz. Sess. Laws, ch. 203, § 1 (§ 13-3401); 2008 Ariz. Sess. Laws, ch. 301, § 72 (§ 13-3407).

[2]The instruction provided:

> The crime of possession/use of a dangerous drug requires proof of the following three things:
>
> 1. The defendant knowingly possessed/used a dangerous drug; *and*
>
> 2. The substance was in fact a dangerous drug; *and*
>
> 3. The defendant possessed a usable amount of that drug. It is a usable amount if it is of such quantity that it could be used according to the known practices of users of that drug.

measure the sufficiency of the evidence. *See United States v. Williams*, 376 F.3d 1048, 1051 (10th Cir. 2004) ("The law of the case is applied to hold the government to the burden of proving each element of a crime as set out in a jury instruction to which it failed to object, even if the unchallenged jury instruction goes beyond the criminal statute's requirements."); *United States v. Zanghi*, 189 F.3d 71, 79 (1st Cir. 1999) (same). Even under this standard, the evidence was still sufficient to support the verdict.[3]

¶10 Arizona case law before *Cheramie* held that evidence was insufficient to support a drug conviction only if the amount possessed was "incapable of being put to any effective use." *State v. Moreno*, 92 Ariz. 116, 120, 374 P.2d 872, 875 (1962). Here, the criminalist's testimony supported a finding that the methamphetamine, as it was packaged, could be put to effective use in street-level drug transactions. Although he offered conflicting testimony on this point, it is the jury's exclusive role to resolve such conflicts in the evidence. *See State v. Martin*, 106 Ariz. 227, 228, 474 P.2d 818, 819 (1970); *State v. Williams*, 209 Ariz. 228, ¶ 6, 99 P.3d 43, 46 (App. 2004).

¶11 Moreover, Officer J.P. testified he recognized the type of small bag Davis had dropped as one "[c]ommonly known to the police officers as drug paraphernalia t[o] keep illegal drugs in." Davis's attempt to discard this bag during his arrest allowed the inference "that [his] actions were evidence of concealment which reflected a consciousness of guilt." *State v. Earby*, 136 Ariz. 246, 248, 665 P.2d 590, 592 (App. 1983). And Officer C.B. testified the methamphetamine mixture in the bag was a typical street-level amount that could be smoked in a pipe. The evidence was therefore adequate for a rational jury to find Davis knowingly had possessed a usable quantity of methamphetamine. *Cf. State v. Murphy*, 117 Ariz. 57, 62, 570 P.2d 1070, 1075 (1977) (finding "usable amount" of marijuana based, in part, on testimony "[t]here is enough material present to be smoked"); *State v. Quinones*, 105 Ariz. 380, 383, 465 P.2d

[3]We need not address the trial court's basis for denying the renewed Rule 20 motion filed after the verdict, as the court's reasoning does not affect our de novo review.

360, 363 (1970) (upholding "usable amount" determination based on evidence of packaging and location of substance, as well as "testimony explaining how the substance in the packet could be placed in a form for injection by narcotics users").

¶12 In a similar vein, Davis contends the sample underlying count one "did not contain a dangerous drug as defined by statute." He specifically maintains that the evidence was deficient because § 13-3401(6)(b) should require the state to show the "mixture . . . which contains any quantity" of methamphetamine also has "a potential for abuse associated with a stimulant effect." Davis acknowledges, however, that we previously have rejected his interpretation of this statutory language. *See State v. Pecina*, 184 Ariz. 238, 242, 908 P.2d 52, 56 (App. 1995) (emphasizing "it is irrelevant whether the methamphetamine compound or its constituent elements ha[ve] the potential for abuse"); *State v. Light*, 175 Ariz. 62, 63, 852 P.2d 1246, 1247 (App. 1993) ("The state need not prove that methamphetamine has a potential for abuse associated with a stimulant effect on the central nervous system because the legislature has already made the determination that it does."). We see no reason to depart from those precedents.

¶13 In a related argument, Davis challenges the admissibility of Officer C.B.'s testimony that the substance in the bag represented a usable street-level amount that could be smoked in a pipe. Because Davis did not object below, we review only for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). Although he now contends the officer was not qualified to give this testimony under Rule 702, Ariz. R. Evid., the officer was qualified so long as he had knowledge, through training or experience, superior to "an uninformed layman's knowledge of usability" of illicit drugs. *Quinones*, 105 Ariz. at 382, 465 P.2d at 362; *see State v. Gentry*, 123 Ariz. 135, 137, 598 P.2d 113, 115 (App. 1979).

¶14 Officer C.B. testified he had received drug-identification training and had been involved with over one hundred investigations involving methamphetamine in the course of his fifteen-year career with the police department. Davis did not dispute below that the officer had acquired helpful knowledge

"from [his] field work." Thus, the trial court did not abuse its discretion in allowing the officer's opinion based on his training and experience. *See State v. Davolt*, 207 Ariz. 191, ¶ 69, 84 P.3d 456, 475 (2004). As defense counsel implicitly recognized in his cross-examination below, an attack on the officer's expertise because he was "not a trained scientist" concerned the weight to be given to his testimony, not its admissibility. *See State v. Kevil*, 111 Ariz. 240, 247, 527 P.2d 285, 292 (1974). Davis has not explained why he believes the officer's testimony exceeded its permissible bounds or required any remedial action by the court, and we find no support in the record for such a contention.

¶15 In sum, we find the trial court committed no error in admitting the officer's testimony. We also find the evidence sufficient to support the verdict on count one, possession of methamphetamine.[4]

Disposition

¶16 For the foregoing reasons, the convictions and sentences are affirmed.

[4]Because we uphold this conviction, we need not address Davis's contingent argument regarding his conviction for possessing drug paraphernalia. To the extent Davis attempts to independently challenge the sufficiency of the evidence supporting one or more of his paraphernalia convictions, his undeveloped argument on the issue constitutes waiver on appeal. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995).