IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JOHN GABRIEL WEBB,
Appellant.

No. 2 CA-CR 2014-0294
Filed July 1, 2015

Appeal from the Superior Court in Pima County
Nos. CR20123159002 and CR20130718002 (Consolidated)
The Honorable Brenden J. Griffin, Judge
The Honorable Danelle B. Liwski, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Tanja K. Kelly, Assistant Attorney General, Tucson
Counsel for Appellee

Nicole Farnum, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Judge Howard authored the decision of the Court, in which Presiding Judge Vásquez and Judge Kelly concurred.

H O W A R D, Judge:

¶1 Appellant John Webb appeals from his conviction for conspiracy to possess or transport marijuana for sale. He maintains there was insufficient evidence to sustain his conviction and the trial court improperly enhanced his sentence. Finding no error, we affirm.

¶2 "We view the facts and all reasonable inferences therefrom in the light most favorable to upholding the verdicts." *See State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999). In August 2011, an undercover agent with the Drug Enforcement Administration met Keith Robinson, Webb's codefendant, who offered to coordinate a purchase of 2,000 pounds of marijuana. Robinson later called the agent to say the drugs were ready in Phoenix, and, when the agent arrived there, Robinson introduced him to Webb, stating he was his "boss." Webb told the agent he could provide the marijuana for $450 per pound. The agent requested a sample of the marijuana, and Webb made telephone calls attempting to obtain one, but was unsuccessful that day.

¶3 The agent and Webb, in part through Robinson, began negotiating the price of the marijuana, agreeing generally on approximately $1,000,000 for the 2,000 pounds requested. But Webb told the agent he wanted a ten percent payment before connecting the agent to his supplier. Webb ultimately provided the agent with a sample of marijuana, and Webb and the agent agreed to go forward with the purchase.

¶4 The next time Webb and the agent met, the agent waited for the marijuana to arrive, but when it did not, he left, and

he was subsequently told by Emil Jackson, Webb's other codefendant, that the driver transporting the marijuana to the purchase site had been in an accident. Jackson and the agent continued to discuss the marijuana purchase, as well as additional deals involving cocaine and transportation of other marijuana to Chicago, but no purchases transpired.

¶5 Webb testified at trial that he had not believed there was a "real deal" and thought the agent might be a police officer. He also testified that he and the others had intended to rob the agent if he had shown up with the money. He stated he did not have the marijuana, had no source for that quantity of marijuana, and had never intended to supply the marijuana.

¶6 Webb was charged initially with conspiracy to commit various offenses, illegally conducting an enterprise, attempted possession of marijuana for sale, attempted possession of cocaine for sale, and attempted transportation of marijuana for sale in CR20123159001. Due to an error in the indictment, the state sought and obtained a new indictment on the conspiracy count in cause number CR20130718002. The state issued an allegation of prior convictions in relation to the first indictment, but did not issue a new allegation after the second indictment. The causes, however, were consolidated in April 2013, more than a year before the trial in June 2014.

¶7 The jury found Webb guilty of conspiracy to possess or transport marijuana for sale, but either acquitted him or failed to reach an agreement as to the remaining counts. After the state indicated it would not seek a retrial on the undecided counts, the trial court imposed an enhanced sentence of 9.25 years' imprisonment. This appeal followed.

¶8 On appeal, Webb first argues his conspiracy conviction is not supported by sufficient evidence. He maintains the state failed to "present any evidence that [he had] committed an overt act to possess or transport marijuana for sale." Rather he contends the evidence merely showed "a wild goose chase." In support of his argument, he relies solely on his testimony that he had merely

intended to trick the agent into bringing the money and never had obtained the marijuana.

¶9 "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). To convict Webb of conspiracy to possess or transport marijuana the state was required to show that he had, "with the intent to promote or aid the commission of an offense," agreed "with one or more persons" to "engage in conduct constituting the offense" and that "one of the parties [had] commit[ted] an overt act in furtherance of the offense." A.R.S. § 13-1003(A). To possess marijuana, one must "knowingly . . . have physical possession or otherwise exercise dominion or control over" it. A.R.S. §§ 13-105(34), 13-3405. To transport marijuana one must "'convey [it] from one place to another.'" *State v. Scotia*, 146 Ariz. 159, 160, 704 P.2d 289, 290 (App. 1985), *quoting* Webster's New Collegiate Dictionary, at 1233 (1980). "The overt act which is necessary for conspiracy is required" in order to show "that some step has been taken toward executing the illicit agreement. Any action that will corroborate the existence of the agreement and will show that it is being put into effect is sufficient to support the conspiracy charge." *State v. Gessler,* 142 Ariz. 379, 383, 690 P.2d 98, 102 (App. 1984).

¶10 In this case, as detailed above, Webb provided the officer with a sample of the marijuana that was to be transported and sold and he arrived at the agreed-upon location for the sale. Webb's argument that the evidence was insufficient is entirely dependent on his own self-serving testimony, which the jury was free to reject. *See State v. Medrano,* 185 Ariz. 192, 194, 914 P.2d 225, 227 (1996) ("Because of the obvious motive to fabricate, . . . self-serving testimony is subject to skepticism . . . ."); *State v. Clemons,* 110 Ariz. 555, 557, 521 P.2d 987, 989 (1974) (jury not compelled to believe defendant's testimony). His argument is essentially a request that this court reweigh the evidence presented; this we will not do. *State v. Lee*, 189 Ariz. 590, 603, 944 P.2d 1204, 1217 (1997).

¶11 Webb also challenges his enhanced sentence. He contends the state was required to allege his prior conviction not only in the first cause number, but in the second as well, despite the consolidation of the two causes for trial. We review this issue for an abuse of discretion because a trial court "has broad discretion in sentencing and, if the sentence imposed is within the statutory limits, we will not disturb the sentence unless there is a clear abuse of discretion."[1] *State v. Ward*, 200 Ariz. 387, ¶ 5, 26 P.3d 1158, 1160 (App. 2001); *see also State v. Ferriera*, 128 Ariz. 530, 532, 627 P.2d 681, 683 (1981).

¶12 The only authority Webb cites in support of his claim is this court's decision in *Pinto v. Superior Court*, 119 Ariz. 612, 583 P.2d 268 (App. 1978). In that case, we decided that, although under this state's former indeterminate sentencing scheme, "an unalleged and unproven conviction can be considered by a trial court in fixing the sentence for the offense charged," an allegation and notice was required when the offense was one "under a separate statute for prior offenders." *Id.* at 613, 583 P.2d at 269. That decision does not address the situation presented by consolidated causes and is not applicable here. Webb has cited no authority to suggest that an allegation in one cause does not provide adequate notice when that cause is consolidated with another. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Benak*, 199 Ariz. 333, ¶ 16, 18 P.3d 127, 131 (App. 2001) (notice sufficient if "defendant is not 'misled, surprised or deceived in any way by the allegations' of prior convictions."), *quoting State v. Bayliss,* 146 Ariz. 218, 219, 704 P.2d 1363, 1364 (App.

[1]The state points out that Webb did not raise this argument at sentencing, but instead objected two days later at a status conference, and should therefore be entitled only to fundamental error review. In some situations, claims forfeited at sentencing may still be raised on appeal. *State v. Vermuele*, 226 Ariz. 399, ¶ 14, 249 P.3d 1099, 1103 (App. 2011). But in this case the sentencing range was discussed before sentencing, allowing Webb to have raised the issue at or before the time sentence was imposed. We conclude, however, that no reversible error occurred, regardless of the standard employed.

1985). We therefore cannot say the trial court erred or abused its discretion in imposing an enhanced sentence.[2]

¶13 For these reasons, we affirm Webb's conviction and sentence.

[2]At trial, Webb admitted to having been convicted previously of solicitation to sell marijuana and possession of marijuana.