IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

NATHAN BLAKE BYRD,
Appellant.

No. 2 CA-CR 2015-0421
Filed November 30, 2016

Appeal from the Superior Court in Cochise County
No. S0200CR201500347
The Honorable Wallace R. Hoggatt, Judge

AFFIRMED IN PART; VACATED IN PART

COUNSEL

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MEMORANDUM DECISION

Judge Staring authored the decision of the Court, in which Judge Espinosa and Judge Kelly[1] concurred.

S T A R I N G, Judge:

¶1 After a bench trial, Nathan Byrd was convicted of possession of methamphetamine for sale, tampering with evidence, and three counts of possession of drug paraphernalia. He was sentenced to concurrent prison terms, the longest of which was eleven years. On appeal, counsel asked us to search the record for fundamental error, asserting she had reviewed the record but found no arguable issue to raise on appeal and citing *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969). Byrd filed a supplemental brief arguing the trial court erred in denying his motion to suppress evidence.

¶2 In our review, we identified arguable issues of error. We ordered the parties to file supplemental briefs addressing the sufficiency of the evidence supporting Byrd's convictions. *See State v. Stroud*, 209 Ariz. 410, n.2, 103 P.3d 912, 914 n.2 (2005) (conviction based on insufficient evidence is fundamental error). We additionally ordered the parties to address whether Byrd's aggravated sentence for possession of methamphetamine for sale was proper. *See State v. McPherson*, 228 Ariz. 557, ¶ 4, 269 P.3d 1181, 1183 (App. 2012) (illegal sentence constitutes fundamental error).

[1]The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

Motion to Suppress

¶3 We first address Byrd's argument, raised in his pro se supplemental brief, that the trial court erred in denying his motion to suppress evidence. In that motion, Byrd argued law enforcement lacked reasonable suspicion to conduct the traffic stop that led to his arrest and, subsequently, evidence seized as a result of that stop should be suppressed, including the methamphetamine he had dropped while fleeing and drug paraphernalia found in the car. "In reviewing the denial of a motion to suppress evidence, we consider only the evidence presented at the suppression hearing, and view that evidence in the light most favorable to upholding the trial court's ruling." *State v. Evans*, 235 Ariz. 314, ¶ 2, 332 P.3d 61, 62 (App. 2014), *quoting State v. Olm*, 223 Ariz. 429, ¶ 2, 224 P.3d 245, 247 (App. 2010).

¶4 In January 2015, just after 1:00 a.m., a deputy sheriff saw a vehicle pull into the unlit parking lot of an apartment complex that had been vacant for about six weeks because it was being renovated. The deputy testified there had been problems with burglaries and drug trafficking in that area. After the deputy followed the vehicle into the parking lot, the vehicle stopped. As the deputy approached on foot, he saw Byrd, in the right rear passenger seat, "lean[] over to the left rear seat." The deputy testified, based on his experience and training, that "people don't move around that much during stops unless something else is going wrong." There were two other occupants, seated in the front of the vehicle.

¶5 The driver of the vehicle gave the deputy an identification card instead of a driver's license and claimed they "were there visiting a friend." After the deputy determined the driver's license had been suspended, he decided to impound the vehicle. When Byrd got out of the car, he "immediately turned away" from the deputy. When the deputy asked Byrd to turn around because he "could not see his hands," Byrd fled. He was arrested after a brief chase.

¶6 The deputy's stop of the vehicle was proper if it was "justified by some objective manifestation" that any of its occupants

were "engaged in criminal activity." *Evans*, 235 Ariz. 314, ¶ 7, 332 P.3d at 63, *quoting State v. Richcreek*, 187 Ariz. 501, 504, 930 P.2d 1304, 1307 (1997). "'[R]easonable suspicion' is a 'commonsense, nontechnical concept[] that deal[s] with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" *Id.*, *quoting Ornelas v. United States*, 517 U.S. 690, 695 (1996) (alterations in *Evans*). In reviewing whether law enforcement officers had the reasonable suspicion "required for an investigatory stop, we 'apply a peculiar sort of de novo review, slightly more circumscribed than usual, because we defer to the inferences drawn by the [trial] court and the officers on the scene, not just the [trial] court's factual findings.'" *Id.* ¶ 8, *quoting United States v. Valdes-Vega*, 738 F.3d 1074, 1077 (9th Cir. 2013) (alterations in *Evans*). We will affirm the court's ruling if the officer had "a 'particularized and objective basis' for suspecting legal wrongdoing." *Id.* ¶ 9, *quoting United States v. Arvizu*, 534 U.S. 266, 273 (2002). Relevant factors include "the suspect's conduct and appearance, location, and surrounding circumstances, such as the time of day, and taking into account the officer's relevant experience, training, and knowledge." *State v. Fornof*, 218 Ariz. 74, ¶ 6, 179 P.3d 954, 956 (App. 2008).

¶7 Byrd argues that the fact he was in what the deputy described as a "high crime area" did not justify his detention, and the deputy did not see the driver commit a traffic violation. Byrd is correct that a person's mere presence in a high-crime area, without more, is insufficient to warrant an investigatory detention. *See In re Ilono H.*, 210 Ariz. 473, ¶ 6, 113 P.3d 696, 698 (App. 2005). But he ignores the other attendant circumstances. In light of the deputy's concern about burglaries and drug trafficking in the area, the vehicle's 1:00 a.m. entry into a vacant, unlit apartment complex undergoing renovation clearly supported the deputy's suspicion of criminal activity. And nothing in the record or law supports Byrd's passing suggestion that he was improperly detained because the deputy's investigation concerned only the driver, or that he was not subject to search when apprehended after fleeing the scene. *See Arizona v. Johnson*, 555 U.S. 323, 327 (2009) (law enforcement necessarily detains passengers during traffic stop); *State v. Gant*, 216

Ariz. 1, ¶ 9, 162 P.3d 640, 642 (2007) (Fourth Amendment permits warrantless search incident to arrest).

Sufficiency of the Evidence

¶8 We review de novo whether the evidence is sufficient to support the verdicts. *See State v. Burns*, 237 Ariz. 1, ¶ 72, 344 P.3d 303, 322 (2015). "'Substantial evidence' to support a conviction exists when 'reasonable persons could accept [it] as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *Id.*, *quoting State v. West*, 226 Ariz. 559, ¶ 16, 250 P.3d 1188, 1191 (2011) (alteration in *Burns*). We view the evidence in the light most favorable to sustaining the verdicts. *See id.*

¶9 Pursuant to Byrd's waiver of his right to a jury trial and the parties' agreement, the trial court determined Byrd's guilt based solely on exhibits. The exhibits presented to the court included three police reports, a list of items taken into evidence, a photograph, a scientific examination report, and the video from the dashboard camera in the arresting deputy's vehicle. Those exhibits demonstrate Byrd fled from the traffic stop and, after he was about twenty-five yards away, dropped a plastic bag containing about five grams of methamphetamine as he ran. A white cloth glove with two syringes inside was found in the car near where Byrd had been sitting. He admitted to the arresting deputy the methamphetamine was his, he planned to "give [the methamphetamine] out," he owed $100 for the drugs, and he had come to Sierra Vista because "business is good" there.

¶10 Byrd argues the evidence supporting his conviction of possession of methamphetamine for sale was insufficient because there was no evidence he intended to sell the methamphetamine. *See* A.R.S. § 13-3407(A)(2). But, as set out above, his admissions demonstrated the methamphetamine was for sale. And we reject Byrd's argument that the trial court could not conclude he had possessed the bag containing that methamphetamine; not only did he admit the methamphetamine was his, it was found near where the officer saw him throw an object as he fled.

¶11 Byrd also argues he could not be found guilty of tampering with evidence because he had merely dropped the bag of methamphetamine "and did not throw it in a dumpster, conceal it, damage it or render it useless for evidentiary purposes." Byrd disregards other means by which a person can commit evidence tampering. As the state correctly points out, a conviction can be based on a defendant having "remove[d] physical evidence with the intent to impair its verity or availability." A.R.S. § 13-2809(A). Byrd clearly did so here, admitting he tried to "get rid of [the methamphetamine] as he ran."

¶12 Byrd does not separately address his convictions for possession of drug paraphernalia based on the syringes and white glove found in the vehicle, apparently because he mistakenly believes those items were also found in the plastic bag he discarded while fleeing. The trial court could conclude, however, that Byrd had possessed those items because they were found underneath the seat in front of where he had been sitting in the car. *See* A.R.S. § 13-3415(A). And, the court readily could conclude the syringes constituted drug paraphernalia. *See* A.R.S. § 13-3415(F)(2)(k).

¶13 The white glove containing the syringes, however, is a different matter. There is no evidence that glove would be, was intended to be, or was designed to be used in "planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling or otherwise introducing into the human body a drug." § 13-3415(F)(2). Although, had the glove contained drugs, it arguably could be described as a "container" for those drugs, it does not otherwise resemble the numerous examples of drug paraphernalia detailed in § 13-3415(F)(2)(a) to (l). Thus, this conviction must be vacated.

Sentence Aggravation

¶14 Last, Byrd argues his aggravated sentence for possession of methamphetamine for sale was improper because the trial court did not specify any aggravating factors. The court stated

at sentencing that it could "easily justify" imposing the maximum sentence of fifteen years for that conviction "because of the aggravating circumstances." *See* § 13-3407(E). However, it did not explain what aggravating circumstances it had found in imposing what the court characterized as a "somewhat aggravated" eleven-year prison term, a term one year greater than the presumptive term. *See id.*

¶15 A sentencing court is required to identify an aggravating factor before imposing an aggravated sentence; thus, the trial court erred by failing to do so here. *See State v. Bonfiglio*, 231 Ariz. 371, ¶ 14, 295 P.3d 948, 951 (2013) (sentencing court must articulate aggravating and mitigating factors and explain sentence imposed); *State v. Long*, 207 Ariz. 140, ¶ 36, 83 P.3d 618, 625 (App. 2004) ("A trial court must set forth reasons in support of each aggravating and mitigating circumstance it finds."). Byrd acknowledges, however, that at least one potential aggravating factor enumerated in A.R.S. § 13-701 is present here and is undisputed—that he had committed a felony within the preceding ten years, *see* § 13-701(D)(11). We may "affirm without remand . . . where the record clearly shows the trial court would have reached the same result" absent the error. *State v. Ojeda*, 159 Ariz. 560, 562, 769 P.2d 1006, 1008 (1989). In light of the court's clear intent to impose an aggravated sentence, there is no need to remand the case for it to clarify its sentencing determination because it would impose the same sentence on remand.[2]

[2]Byrd did not raise this issue below. But, because we find no error warranting remand in any event, we need not determine whether he has thus forfeited relief. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005) ("defendant who fails to object at trial forfeits the right to obtain appellate relief" unless defendant shows fundamental, prejudicial error); *State v. Vermuele*, 226 Ariz. 399, ¶ 6, 249 P.3d 1099, 1101 (App. 2011) (defendant did not waive ordinary appellate review by failing to object during or following imposition of sentence).

Disposition

¶16 We vacate Byrd's conviction and sentence for possession of drug paraphernalia based on his possession of the white glove. Having rejected the arguments raised in his supplemental brief and having found no other fundamental error, we affirm his remaining convictions and sentences.