IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

DONALD MICHAEL MCAFEE III,
Appellant.

No. 2 CA-CR 2016-0017
Filed November 18, 2016

Appeal from the Superior Court in Pinal County
No. S1100CR201402468
The Honorable Joseph R. Georgini, Judge
The Honorable Stephen F. McCarville, 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

Rosemary Gordon Pánuco, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Howard and Judge Staring concurred.

E S P I N O S A, Judge:

¶1 After a jury trial, Donald McAfee III was convicted of possession of a narcotic drug for sale and possession of drug paraphernalia, and the trial court sentenced him to concurrent, minimum prison terms, the longer of which was four years. On appeal, McAfee raises two evidentiary issues and argues there was insufficient evidence to support his convictions. For the reasons that follow, we affirm.

Factual and Procedural Background

¶2 In October 2014, a Pinal County Sheriff's Deputy assigned to the K-9 Unit stopped McAfee's vehicle after observing a lane violation and an air freshener obstructing the driver's view. McAfee, who was a passenger in the vehicle, explained that although his mother was the registered owner, the vehicle was his and his friend was driving because his license had been suspended. As the deputy conducted "routine license warrants checks" on the occupants, he spoke with the driver outside the vehicle. The deputy testified that the driver exhibited physical signs of nervousness while answering his questions, and that the same indications of nervousness were observed when he spoke with McAfee. Those signs included "body tremors," shaky hands, and long pauses during questioning. The deputy also testified that McAfee offered an inconsistent account of what the two had been doing that day.

¶3 The deputy decided to "run [his] dog around the car," and the dog alerted to the presence of drugs by "scratching at the car." A search of the vehicle revealed a backpack in the back seat containing used syringes, a digital scale, and other evidence of drug

use. Also found was a baggie containing an ounce of heroin and another digital scale under the seat where McAfee had been sitting. At trial, he denied being aware of the drugs, but was convicted and sentenced as described above. We have jurisdiction over McAfee's appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Unreasonable Search and Seizure

¶4 Before trial, McAfee moved to suppress the drug and paraphernalia evidence as obtained in violation of his Fourth Amendment rights, citing *Rodriguez v. United States*, ___ U.S. ___, ___, 135 S. Ct. 1609, 1612 (2015). In that case, the Supreme Court held that "a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures." McAfee argued "the absence of reasonable suspicion" meant "there should never have been a search." The trial court disagreed, finding "[McAfee]'s detention for the dog sniff in this case [to be] independently supported by individualized reasonable suspicion based on the totality of the circumstances."

¶5 On appeal, McAfee renews his argument that the prolonged detention and subsequent search of his vehicle violated the rule in *Rodriguez* prohibiting stops which "exceed[] the time needed to handle the matter for which the stop was made." ___ U.S. at ___, 135 S. Ct. at 1612. The state counters that McAfee was "reasonably detained . . . based on objective, articulable grounds to suspect criminal activity," and, even if reasonable suspicion had been lacking, the evidence was admissible under the good-faith exception to the exclusionary rule. In reviewing the trial court's ruling on a motion to suppress, we consider only the evidence presented at the suppression hearing and defer to the trial court's factual findings. *State v. Kjolsrud*, 239 Ariz. 319, ¶ 8, 371 P.3d 647, 650 (App. 2016).

¶6 Whether there was sufficient founded suspicion to conduct a canine sniff-search of McAfee's vehicle may be a close question, but it is one we need not resolve here as the search was

clearly justified under this court's earlier decision in *State v. Box*, 205 Ariz. 492, 73 P.3d 623 (App. 2003), *abrogated in part by Rodriguez*, ___ U.S. ___, 135 S. Ct. 1609, and our more recent opinion in *State v. Driscoll*, 238 Ariz. 432, 361 P.3d 961 (App. 2015).

¶7 At the time McAfee was stopped, the law in Arizona permitted a de minimis prolonged detention for the purpose of conducting a dog inspection of a vehicle. *See Box*, 205 Ariz. 492, ¶¶ 5, 24, 73 P.3d 623, 625, 630 (App. 2003) (concluding a brief extension of the stop for the deployment of a dog already at the scene, for a dog sniff "not unreasonable under the Fourth Amendment"). It was almost six months after McAfee was stopped and arrested that the Supreme Court explicitly required reasonable suspicion for any extension of a traffic stop to conduct a dog sniff. *Rodriguez*, ___ U.S. at ___, 135 S. Ct. at 1614 (noting authority for seizure ends when "tasks tied to the traffic infraction are—or reasonably should have been—completed").

¶8 McAfee acknowledges *Box* was controlling law at the time he was stopped, but argues the facts here are distinguishable and "much closer to those in *Sweeney* and *Kjolsrud* than to those in *Driscoll* and *Box*." We disagree. In *Kjolsrud*, we found the good-faith exception to the exclusionary rule inapplicable where the state lacked reasonable suspicion to search and Kjolsrud was forced to wait "approximately ten minutes" for another deputy to come to the scene before the dog sniff occurred. 239 Ariz. 319, ¶¶ 23-25, 371 P.3d at 653-54. Similarly, in *State v. Sweeney* we found a post-traffic-stop detention was not de minimis when the defendant was physically restrained and then forced to wait for the arrival of a second officer before the dog sniff was conducted. 224 Ariz. 107, ¶¶ 14-15, 227 P.3d 868, 872 (App. 2010).

¶9 In contrast, McAfee was not made to wait for back up units, nor was he restrained at any time prior to his arrest. The evidence at the suppression hearing indicated that only ten to fifteen minutes elapsed from the time the vehicle was stopped to when the dog sniff was conducted, during which the deputy spoke separately with McAfee and the driver in turn, conducted license and warrant checks, and then requested consent to search the vehicle. Thus, it is

apparent the time to conduct the dog sniff resulted in only a minimally prolonged detention like the one found constitutionally permissible in *Box*. 205 Ariz. 492, ¶ 24, 73 P.3d at 630.

¶10 In *Driscoll*, we addressed a similar situation and concluded that although "the extension of the traffic stop to conduct a dog sniff violated the rule in *Rodriguez*," because "*Box* was controlling Arizona law" at the time of the stop, application of the exclusionary rule would be inappropriate. 238 Ariz. 432, ¶ 17, 361 P.3d at 965; *see also Davis v. United States*, 564 U.S. 229, 241 (2011) ("Evidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule."). The same reasoning applies here and we conclude the trial court did not err in denying McAfee's motion to suppress the evidence.

Contents of Backpack

¶11 McAfee next argues the trial court erred by admitting photographs of the "various items of [drug] paraphernalia" found in the backpack in his vehicle. At trial, the deputy explained that after McAfee and the driver were placed under arrest, "the driver confessed . . . that the backpack belonged to him." When the state offered photographs of the contents of the backpack, which included syringes, a scale, and a shoelace, McAfee objected, arguing the evidence was not relevant as he was not "charged with any counts relating to the items depicted."

¶12 The state contends "the contents of the backpack were relevant regardless of whether the jury found that [the driver] had exclusively owned the backpack and the contents therein." It reasons that the driver's possession of those items "tend[s] to show that [McAfee] likely owned the separate and independent drug-related stash found directly under his seat." The state also points out the trial court's observation that the presence of a scale in the backpack "made it more likely" that the other scale, along with the heroin next to it, belonged to McAfee. We review the admissibility of evidence for abuse of discretion. *State v. Fillmore*, 187 Ariz. 174, 179, 927 P.2d 1303, 1308 (App. 1996).

¶13 Under Rule 401, Ariz. R. Evid., evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence." *See also State v. Roque*, 213 Ariz. 193, ¶ 109, 141 P.3d 368, 396 (2006) ("The threshold for relevance is a low one."). We agree the paraphernalia evidence in the driver's backpack was relevant to show McAfee's possession of the heroin and scale under the seat of his vehicle for which he was charged. Had those items belonged exclusively to the driver, as alleged by McAfee below and on appeal, there is a likelihood they too would have been in the driver's backpack. Moreover, as the trial court noted, the presence of two digital scales, both of which the deputy testified were the type used to weigh heroin, suggests that one of the scales belonged to the driver and the other belonged to McAfee. We therefore conclude the trial court did not abuse its discretion in admitting the photographs of the drug paraphernalia in the driver's backpack.[1]

Sufficiency of the Evidence

¶14 McAfee lastly contends the evidence was insufficient to support his conviction and the trial court thus erred in denying his motion for a judgment of acquittal under Rule 20, Ariz. R. Crim. P. We consider sufficiency-of-the-evidence challenges de novo, *State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011), reviewing only to determine whether substantial evidence supports the verdicts, *State v. Hausner*, 230 Ariz. 60, ¶ 50, 280 P.3d 604, 619 (2012). "Substantial evidence" is that which reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt. *State v. Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d 912, 913-14 (2005).

[1]McAfee also asserts the trial court erred by not considering the prejudicial and probative value of the photographs, but he has failed to develop the argument in any meaningful way. He therefore has waived the issue on appeal and we do not address it further. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Dann*, 205 Ariz. 557, n.8, 74 P.3d 231, 244 n.8 (2003) (failure to develop argument waives appellate consideration).

¶15 At the close of the state's case-in-chief, McAfee argued the state had failed to show that he "had knowledge of the drugs and that he exercised control over those drugs." The state responded that there was ample circumstantial evidence supporting the charges, pointing out the drugs were found in McAfee's own vehicle, under the seat where he was sitting, and he exhibited pronounced signs of nervousness when speaking with the deputy. The court denied McAfee's motion, finding the evidence sufficient "for the jury to make a determination as to whether or not the State has carried their burden." After closing arguments, the court additionally noted that the two different scales in the car suggested "that each person possessed a separate measuring device."

¶16 Viewing the evidence in the light most favorable to sustaining the jury's verdict, we agree with the trial court that it was sufficient. *Id.*; *State v. Gray*, 231 Ariz. 374, ¶¶ 2-3, 295 P.3d 951, 952-53 (App. 2013). Possession of drugs and drug paraphernalia may be actual or constructive, *State v. Barreras*, 112 Ariz. 421, 423, 542 P.2d 1120, 1122 (1975), and may be proven by direct or circumstantial evidence, *see State v. Villalobos Alvarez*, 155 Ariz. 244, 245, 745 P.2d 991, 992 (App. 1987). The evidence presented here, though circumstantial, would permit a reasonable jury to conclude McAfee constructively possessed the heroin and scale found under his seat in his car. *See State v. Ingram*, 239 Ariz. 228, ¶¶ 21-25, 368 P.3d 936, 941-42 (App. 2016) (knowledge of concealed contraband may be inferred from constructive possession and surrounding circumstances); *State v. Donovan*, 116 Ariz. 209, 213, 568 P.2d 1107, 1111 (App. 1977) (same). McAfee points to his own testimony that he was unaware of the items under the seat, but the jury was free to reject his claims and draw its own conclusions based on all of the evidence. *See State v. Lowery*, 230 Ariz. 536, ¶ 6, 287 P.3d 830, 833 (App. 2012) (jury may discredit defendant's testimony for various reasons, including personal interest); *State v. Williams*, 111 Ariz. 175, 178, 526 P.2d 714, 717 (1974) (same). Accordingly, we find no error in the court's denial of McAfee's Rule 20 motion.

Disposition

¶17 For all of the forgoing reasons, McAfee's convictions and sentences are affirmed.