IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

TROY CHESTER O'CLAIR,
Appellant.

No. 2 CA-CR 2016-0279
Filed August 10, 2017

Appeal from the Superior Court in Pinal County
No. S1100CR201500602
The Honorable Kevin D. White, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel, Phoenix
By Jillian Francis, Assistant Attorney General, Phoenix
Counsel for Appellee

Harriette P. Levitt, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

E S P I N O S A, Judge:

¶1 In June 2016, Troy O'Clair was convicted of possession of a dangerous drug for sale in violation of A.R.S. § 13-3407(A)(2) and possession of a dangerous drug in violation of § 13-3407(A)(1). The trial court sentenced him to slightly mitigated, concurrent prison terms the longer of which was eight years. On appeal, O'Clair argues the state presented insufficient evidence to support his conviction of possession for sale and his conviction for possession was improper because it was a lesser-included offense of the possession for sale charge. We affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts. *State v. Roseberry*, 210 Ariz. 360, ¶ 45, 111 P.3d 402, 410-11 (2005). In February 2015, O'Clair was stopped by an Apache Junction Police Department detective for two minor traffic violations. During the stop, the detective found a package of methamphetamine in O'Clair's hand. The detective said, "dope," to which O'Clair responded that it was for a woman, and the detective handcuffed him, conducted a more thorough search, and found a second package of methamphetamine in O'Clair's coin pocket. Following his arrest, O'Clair admitted to police that he had bought the first package for $60 and intended to sell it to the woman for that

[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.

amount plus another $20 for the delivery. O'Clair also said he "didn't even remember [the second package] was in [his pocket]."

¶3 The state charged O'Clair with possession of a dangerous drug for sale, possession of a dangerous drug, and sale or transportation of dangerous drugs, but dismissed the third charge prior to the start of trial. After a two-day jury trial, O'Clair was convicted on both charges. He was sentenced as described above, and we have jurisdiction over his appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Sufficiency of the Evidence

¶4 O'Clair first contends there was insufficient evidence to support his possession for sale conviction. Specifically, he argues the state's only evidence he intended to sell the methamphetamine was the amount on his person and, although the arresting detective testified five grams indicated an intent to sell, O'Clair had less than that amount without the packaging. He also argues the $20 he was to receive for delivering the drugs was insufficient to prove intent to sell.

¶5 Evidence is sufficient to uphold a conviction when the jury's verdict is supported by substantial evidence, that is, evidence "reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt." *State v. Cox*, 217 Ariz. 353, ¶ 22, 174 P.3d 265, 269 (2007), *quoting State v. Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d 912, 914 (2005). "[T]he relevant question is whether, 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.*, *quoting Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (modification in *Cox*).

¶6 Section 13-3407(A)(2) states, "A person shall not knowingly . . . [p]ossess a dangerous drug for sale." "Criminal intent, being a state of mind, is shown by circumstantial evidence. [A d]efendant's conduct and comments are evidence of his state of mind." *State v. Bearup*, 221 Ariz. 163, ¶ 16, 211 P.3d 684, 688 (2009), *quoting State v. Routhier*, 137 Ariz. 90, 99, 669 P.2d 68, 77 (1983).

¶7 O'Clair emphasizes the detective's testimony regarding the connection between intent to sell and the amount of drugs found. Specifically, the detective testified, "[S]ometimes simply just the amount of a certain drug is indicia of sale." He also testified the combined weight of O'Clair's two packages was a little over five grams including packaging. And when asked during cross-examination, "So the amount that you seized that day was, roughly, a personal use amount in your opinion?" he responded, "Five grams, to me, is more than personal use." O'Clair concludes from this testimony that the state failed to prove he had enough methamphetamine to infer he intended to sell it because the forensic scientist testified that the first package weighed 3.51 grams without its packaging and the second weighed .32 grams without its packaging.

¶8 The state, however, did not rely solely on the amount of methamphetamine to prove O'Clair's intent to sell it. Rather, the state introduced O'Clair's own statements regarding his intent. In particular, the arresting detective testified that when he first confronted O'Clair about the package in his hand containing "dope," O'Clair responded "it wasn't his, that it was for a[] female." Then, at the police station, O'Clair said "he had just purchased it for . . . $60 and he was going to drive it to a[] female . . . to make an additional $20 on top of his $60 by selling it to her." Furthermore, the state introduced into evidence the recordings from both the detective's body camera and his police station interview with O'Clair so the jury could hear O'Clair's statements first-hand.

¶9 O'Clair argues he "never stated that he was selling methamphetamine. He only stated he was delivering it to someone who was going to pay him for his delivery services." But the detective testified as noted above, indicating O'Clair would recoup the $60 he paid and then make an additional $20 on the transaction. The state reinforced this conclusion through the interview recording in which O'Clair said he "make[s] twenty bucks off it," "get[s] rid of it on the side," and "they pay $60 for it," prompting the detective to clarify, "So it's $80 total?" to which O'Clair agreed. A jury could readily accept this evidence as proof beyond a reasonable doubt that O'Clair

intended to sell the first package of methamphetamine. *See Cox*, 217 Ariz. 353, ¶ 22, 174 P.3d at 269.

Lesser-Included Offense

¶10 O'Clair next argues his conviction for simple possession violated double jeopardy because possession is a lesser-included offense of possession with intent to sell. O'Clair concedes he did not raise this argument below, and thus we review only for fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). A conviction in violation of double jeopardy, however, constitutes fundamental error. *State v. McGill*, 213 Ariz. 147, ¶ 21, 140 P.3d 930, 936 (2006). We determine whether a double jeopardy violation occurred de novo. *Id.*

¶11 O'Clair correctly points out possession of a dangerous drug is a lesser-included offense of possession with intent to sell. *See Gray v. Irwin*, 195 Ariz. 273, ¶ 12, 987 P.2d 759, 762 (App. 1999). He is also correct that conviction of both a crime and a lesser-included offense of that crime violates double jeopardy. *See State v. Price*, 218 Ariz. 311, ¶ 5, 183 P.3d 1279, 1281 (App. 2008) ("For double jeopardy purposes, a lesser included offense and the greater offense of which it is a part constitute the same offense, and multiple punishments for the same offense are not permissible."). But he ignores that his convictions stemmed from two distinct packages of methamphetamine.

¶12 Contrary to O'Clair's argument, the state did not "lump[] together the two packages of methamphetamine" to show he had more than five grams. As discussed above, the state did not rely on the amount of methamphetamine to prove O'Clair's intent to sell the package the detective found in his hand. Although the detective did refer in cross-examination to the total amount of methamphetamine when asked about personal use, and identified one of the state's exhibits as a photograph of both packages weighed together, the state otherwise and consistently distinguished the packages.

¶13 In its opening statement, the prosecution said the evidence would show O'Clair "possessed methamphetamine, a dangerous drug, and possessed it for sale" and "[he] also possessed

another bagg[ie] of methamphetamine." The state further emphasized during closing argument, "Count 1 is the possession of dangerous drugs for sale. What that is is that larger baggie. You remember it as Exhibit Number 24, the larger baggie of methamphetamine," and "Count 2 is just possession of dangerous drugs. That's the smaller baggie that Detective Pennington found in the defendant's coin pocket that he . . . [said] he forgot . . . w[as] in his pants."[2]

¶14 More importantly, the detective's testimony clearly demarcated the first, larger package of methamphetamine found in O'Clair's hand and the second one found in O'Clair's pocket. Both the prosecutor's questions and the detective's answers regarding O'Clair's intent to sell the first package referred specifically to the methamphetamine that was "in his hand." The jury was also able to see for itself the separate discoveries of the two packages when it viewed the body camera video footage admitted into evidence.

¶15 Finally, the jury heard the recorded police station interview in which O'Clair himself expressly distinguished between "the little [package]" he "didn't even remember . . . was in [his pocket]" and the larger package he was on his way to sell at the time he was stopped. All of the state's photographs of the methamphetamine showed two distinct packages, and the forensic scientist's testimony referred to the packages with different exhibit and item numbers although she concluded "both items [were] methamphetamine."

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[2]Contrary to O'Clair's argument that the charging document "d[id] not delineate between the two packages" and "the State's closing argument does not constitute evidence and . . . cannot be used" to do so, opening and closing arguments are properly considered to reveal the state's theory of the defendant's guilt. *Cf. State v. Waller*, 235 Ariz. 479, ¶ 32, 333 P.3d 806, 816 (App. 2014) ("Whether the charge implicated more than one subsection of the assault statute cannot be determined by analysis of the indictment alone, but rather depends on the evidence *and theories* presented at trial.") (emphasis added).

¶16 Thus, the state did not "combine[] the two separate packages of methamphetamine for purposes of proving Count One," as O'Clair suggests. On the contrary, the state presented separate evidence of the two counts and specifically related each package to each count. The jury convicted O'Clair of possessing the methamphetamine in his hand with the intent to sell it and simple possession of the methamphetamine in his pocket. These convictions, based on distinct evidence, do not violate double jeopardy.

Disposition

¶17 For the foregoing reasons, O'Clair's convictions and sentences are affirmed.