IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JESS MONTOY,
Appellant.

No. 2 CA-CR 2019-0300
Filed July 16, 2020

Appeal from the Superior Court in Greenlee County
No. CR201900055
The Honorable Monica Stauffer, Judge

AFFIRMED IN PART; VACATED IN PART

COUNSEL

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MEMORANDUM DECISION

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

S T A R I N G, Presiding Judge:

¶1 After a jury trial, Jess Montoy was convicted of possession of a dangerous drug for sale, possession of a dangerous drug, three counts of possession of a narcotic drug, and possession of drug paraphernalia. The trial court sentenced him to concurrent prison terms, the longest of which was twelve years. On appeal, Montoy challenges the sufficiency of the evidence to support his conviction for possession of a dangerous drug for sale. For the following reasons, we affirm in part and vacate in part.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to affirming Montoy's convictions. *See State v. Allen*, 235 Ariz. 72, ¶ 2 (App. 2014). In December 2018, a Greenlee County Sherriff's deputy was on patrol when he noticed an unfamiliar vehicle that appeared to be lost. When it stopped on the side of the road, the deputy pulled his car behind it, approached on foot, and asked the driver, Montoy, if he needed directions. Montoy confirmed that he was lost, and, when he told the deputy where he was headed, the deputy recognized the area as having "drug problems." While they were talking, the deputy noticed Montoy appeared "extremely nervous," "shaky," and "fidgety" and had "pinpoint pupils" that are common with opiate or narcotic use.

¶3 The deputy asked Montoy to step out of the vehicle, and Montoy agreed. When the deputy asked if there was anything in the center console of the vehicle, Montoy responded that "there may be some heroin and some pills." At that point, the deputy detained Montoy and searched the vehicle. In the driver's side door pocket, the deputy found a Tupperware containing heroin, hydrocodone pills, one oxycodone pill, and cocaine. In the center console, he found another Tupperware containing "a large rock" of methamphetamine and a used methamphetamine pipe. In the glove compartment, the deputy found a new scale, an unopened bag of baggies, and an unused methamphetamine pipe. Under the driver's seat,

he found another oxycodone pill. A forensic scientist later determined that the methamphetamine weighed approximately 27.4 grams, the cocaine weighed approximately .79 grams, and the heroin, which was separated into two bags, weighed .94 and .57 grams, respectively—all of which was a "usable quantity."

¶4 After the deputy informed Montoy of the *Miranda* warnings,[1] Montoy stated that someone gave him the Tupperware containing the heroin, pills, and cocaine and instructed him to drive to somewhere in York, where he would get further instructions. Montoy also indicated there was a second Tupperware container in the vehicle but said he did not know what was in it. While the deputy was transferring Montoy to jail, Montoy admitted he had smoked methamphetamine earlier in the day and had used heroin the night before. In Montoy's phone, the deputy found text messages indicating Montoy had "acquir[ed] some pills," other individuals "asking how much for the pills," and Montoy suggesting he needed to buy a scale.

¶5 Montoy was charged with possession of a dangerous drug for sale (methamphetamine), possession of a dangerous drug (methamphetamine), two counts of possession of a narcotic drug for sale (heroin and hydrocodone pills), three counts of possession of a narcotic drug (heroin, hydrocodone pills, and cocaine), and two counts of possession of drug paraphernalia (methamphetamine pipe and scale). The trial court subsequently granted the state's motion to dismiss the two counts of possession of a narcotic drug for sale and one count of possession of drug paraphernalia (scale). Montoy was convicted of the remaining offenses and sentenced as described above. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Sufficiency of the Evidence

¶6 Montoy contends the state presented insufficient evidence to support his conviction for possession of a dangerous drug for sale. We review de novo the sufficiency of the evidence. *State v. Snider*, 233 Ariz. 243, ¶ 4 (App. 2013). In doing so, we view the evidence in the light most favorable to sustaining the jury's verdict and resolve all inferences against the defendant. *State v. Felix*, 237 Ariz. 280, ¶ 30 (App. 2015).

[1]*Miranda v. Arizona*, 384 U.S. 436 (1966).

¶7 A trial court "must enter a judgment of acquittal . . . if there is no substantial evidence to support a conviction." Ariz. R. Crim. P. 20(a). "Substantial evidence is such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *State v. Sharma*, 216 Ariz. 292, ¶ 7 (App. 2007) (quoting *State v. Mathers*, 165 Ariz. 64, 67 (1990)). "If reasonable [persons] may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial." *State v. Davolt*, 207 Ariz. 191, ¶ 87 (2004) (alteration in *Rodriguez*) (quoting *State v. Rodriguez*, 186 Ariz. 240, 245 (1996)). Substantial evidence may be either direct or circumstantial. *State v. Pena*, 209 Ariz. 503, ¶ 7 (App. 2005).

¶8 Pursuant to A.R.S. § 13-3407(A)(2), "[a] person shall not knowingly . . . [p]ossess a dangerous drug for sale." A "dangerous drug" includes methamphetamine. A.R.S. § 13-3401(6)(c)(xxxviii). "'Possess' means knowingly to have physical possession or otherwise to exercise dominion or control over property." A.R.S. § 13-105(34). Possession can be actual, meaning the defendant "knowingly exercised direct physical control over an object," *State v. Gonsalves*, 231 Ariz. 521, ¶ 9 (App. 2013), or constructive, meaning the defendant "either exercised dominion and control over the drug itself, 'or the location in which the substance was found,'" *State v. Gill*, 248 Ariz. 274, ¶ 7 (App. 2020) (quoting *State v. Teagle*, 217 Ariz. 17, ¶ 41 (App. 2007)).

¶9 Here, the deputy found 27.4 grams, which he described as a "large amount," of methamphetamine in a Tupperware container in the center console of Montoy's vehicle. The deputy also found a new scale, a new methamphetamine pipe, and a bag of baggies, which he testified were "indicia of drug sales." The deputy explained that "[t]ypically with sales you're going to see baggies . . . to break up that large quantity of methamphetamine and sell it in smaller quantities" and that scales were used "to weigh the different quantities." In addition, the forensic scientist testified that half a gram of methamphetamine is "a very typical" usable amount. The text messages found on Montoy's phone also indicated he was involved in the sale of pills.

¶10 Montoy nevertheless argues the state failed to present sufficient evidence that he "knew the methamphetamine was in the vehicle." He points out he had recently purchased the vehicle, he had admitted the heroin and the pills were in the vehicle but did not mention the methamphetamine, and the text messages similarly did not refer to methamphetamine. But, as the state points out, these arguments largely

"go to the weight of the evidence, not its sufficiency." To the extent there was conflicting evidence whether Montoy knew the methamphetamine was in the vehicle, it was for the jury to evaluate. *See State v. Buccheri-Bianca*, 233 Ariz. 324, ¶ 38 (App. 2013). And we will not reweigh that determination on appeal. *See id.*

¶11 In addition, Montoy seems to challenge the deputy's credibility because he had been working in that capacity for less than two years and, despite "training in drug investigations," he lacked "specific knowledge as to methamphetamine." However, credibility determinations are also reserved for the jury, and we will not reweigh them. *See id.* In sum, the state presented sufficient evidence from which reasonable persons could find Montoy guilty beyond a reasonable doubt of possession of a dangerous drug for sale. *See Snider*, 233 Ariz. 243, ¶ 4.

Double Jeopardy

¶12 Although neither Montoy nor the state has raised the issue, we have identified fundamental error, which we cannot ignore. *See State v. Fernandez*, 216 Ariz. 545, ¶ 32 (App. 2007). When multiple convictions are improperly based on a single act, the lesser-included conviction cannot stand. *See State v. Nereim*, 234 Ariz. 105, ¶ 25 (App. 2014). And when the charged possession of a dangerous drug is incidental to the charged possession of a dangerous drug for sale, it is a lesser-included offense because a person cannot commit the possession for sale without also necessarily committing the possession. *See State v. Chabolla-Hinojosa*, 192 Ariz. 360, ¶ 12 (App. 1998); *cf. State v. Trammell*, 245 Ariz. 607, ¶ 10 (App. 2018) (possession of narcotic drugs lesser-included offense of sale of narcotic drugs). Here, as argued to the jury and indicated on the verdict form, Montoy was convicted of both possession for sale and possession of the 27.4 grams of methamphetamine found in his vehicle. Accordingly, the possession is a lesser-included offense and must be vacated.

Disposition

¶13 For the foregoing reasons, we vacate Montoy's conviction and sentence for possession of a dangerous drug, but we otherwise affirm his convictions and sentences.