IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JEFFREY LEE LIDSTER,
Appellant.

No. 2 CA-CR 2019-0296
Filed January 21, 2021

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Appeal from the Superior Court in Gila County
No. S0400CR201800468
The Honorable Timothy M. Wright, Judge

AFFIRMED AS CORRECTED

COUNSEL

Mark Brnovich, Arizona Attorney General
Linley Wilson, Deputy Solicitor General/Section Chief of Criminal Appeals
By Diane Leigh Hunt, Assistant Attorney General, Tucson
Counsel for Appellee

Emily Danies, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Chief Judge Vásquez authored the decision of the Court, in which Presiding Judge Eppich and Judge Brearcliffe concurred.

V Á S Q U E Z, Chief Judge:

¶1 After a jury trial, Jeffrey Lidster was convicted of possession of dangerous drugs for sale, possession of narcotic drugs, possession of drug paraphernalia, and negligent child abuse. The trial court imposed concurrent and consecutive prison terms totaling 24.5 years. He now appeals, contending (1) the trial court erred in failing to grant his motion for mistrial after a prosecution witness mentioned that he had been in prison, and (2) insufficient evidence supported his convictions. For the following reasons, we affirm with a correction to the sentencing order.

Factual and Procedural Background

¶2 We view the facts and all reasonable inferences in the light most favorable to affirming Lidster's convictions. *See State v. Molina*, 211 Ariz. 130, ¶ 2 (App. 2005). On July 2, 2018, police and the Department of Child Safety (DCS) visited Lidster's home to check on the welfare of Lidster's thirteen-month-old child, E.L., for whom Lidster was the primary caretaker. A foul, heavy odor hung in the air, and the house was filthy: dirty dishes were stacked in the sink and on countertops, "crud" was all over the floors, and the toilet was covered in feces. Clutter was stacked to the ceiling in the kitchen, and one bedroom was so full of clutter it could not be entered. There was "something wrong with the water," and electricity had been imported from a neighbor through extension cords strung throughout the home.

¶3 Neither Lidster nor E.L. was home during the welfare check. When police and DCS located Lidster later that day, his speech was slurred and incoherent, and he was unsteady on his feet. Because of the conditions in the home and Lidster's evident substance abuse, DCS removed E.L. from the home. Later, a hair follicle drug test showed that E.L. had been exposed to heroin in the previous ninety days.

¶4 Based on E.L.'s positive drug test, police obtained a search warrant. As police surveilled the home on August 15 and prepared to execute the warrant, Lidster's roommate, Michael Thompson, drove off in

Lidster's vehicle. Police stopped Thompson and found a small amount of methamphetamine and heroin in baggies that appeared to have been recently packaged, and nearly $800 in cash. On the same keychain as the key to Lidster's car, police found a key to a safe.

¶5 In Lidster's home, police found methamphetamine and heroin in Thompson's bedroom, along with a glass pipe, two uncapped syringes, and a "rig kit" for intravenous drug use. Cotton swabs were found in Lidster's room, and an uncapped syringe in the bathroom. A digital scale and a glass pipe, both crusted with drug residue, were found in another bedroom. A later search of a backpack found in a junk vehicle in Lidster's front yard revealed a box full of syringes, and inside a tote bag from the same vehicle, officers found the safe opened by the key they had found on Thompson. Inside the safe they found .94 grams of heroin, 12.9 grams of methamphetamine, and unused "bindle baggies" similar to those in which the drugs found on Thompson had been packaged.

¶6 Lidster was indicted on several counts of drug and paraphernalia possession and child abuse, and he was convicted and sentenced as described above. This appeal followed. We have jurisdiction under A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Testimony about Lidster's Criminal History

¶7 Lidster contends that the trial court erred in failing to grant a mistrial when a police phlebotomist testified during cross-examination that Lidster had indicated he had been in prison. The state has implicitly conceded that the remarks about Lidster's criminal history constituted error, but contends that Lidster invited it because his counsel asked the question and the phlebotomist's answer was responsive to it.[1] We review de novo whether error constitutes invited error. *See State v. Stuard*, 176 Ariz. 589, 600-01 (1993).

¶8 At trial, a police phlebotomist testified for the state about why blood had not been drawn from Lidster. The phlebotomist testified that he was only trained in drawing blood from arms and hands, and Lidster's were so scarred from previous intravenous use that he could not find a place from which he could draw blood. In order to determine other options,

[1]We reject the state's contention that the issue is waived on appeal by insufficient argument. Lidster contests the state's premise that he invited the testimony through analysis of *State v. Stuard*, 176 Ariz. 589, 600 (1993), a leading case on invited error with facts similar to those here.

he had asked Lidster about where he injected, and Lidster replied that he had injected behind his ear. Because the phlebotomist was uncomfortable drawing blood from there, no blood was drawn.

¶9 On cross-examination, the following exchange occurred:

> [Lidster's attorney:] The conversation that you had with him about injecting behind his ear, he didn't say when that occurred, correct?
>
> [Witness:] No, he didn't.
>
> He seemed to indicate it was in prison, if I remember right.
>
> I didn't ask when that was.

Lidster moved for a mistrial, arguing that the witness had improperly referred to his criminal history.

¶10 The trial court denied the motion, concluding that Lidster had invited the improper testimony. It determined that Lidster's counsel had not intentionally elicited the testimony—he did not know the potential answer because he had not interviewed the phlebotomist and the phlebotomist had not issued a report. But it reasoned that Lidster had nonetheless invited the testimony because the answer was responsive to Lidster's question, and although the question could have been answered with a "yes" or "no," Lidster had not stopped the witness when the witness continued after his initial "no" answer.

¶11 The invited error doctrine "prevents a defendant from introducing forbidden evidence and then seeking reversal based on its erroneous introduction." *Stuard*, 176 Ariz. at 600. The defendant need not have purposefully introduced the evidence for the invited error doctrine to apply; even if the evidence is introduced unintentionally, the doctrine applies if "responsibility for its introduction lies with defense counsel." *Id.* at 600-01. "[I]f defense counsel invited trial error, strategically or carelessly, the defendant cannot obtain appellate relief even if the error was fundamental and prejudicial." *State v. Escalante*, 245 Ariz. 135, ¶ 38 (2018).

¶12 In *Stuard*, defense counsel knew, from testimony at a prior hearing, that the witness—a detective—had been told by the defendant during an interrogation that the defendant had been in prison. 176 Ariz. at 601. During cross-examination at trial, defense counsel asked the detective

whether he and the defendant had discussed matters during the interrogation that were not in his report, and the detective replied that he was "sure" they had. *Id.* at 600. Defense counsel then asked, "What other things would you have discussed?" *Id.* The detective replied that Lidster had mentioned "having been in prison." *Id.* (emphasis omitted).

¶13 Our supreme court concluded that the error was invited, given the "previous testimony and the question's broad nature." *Id.* at 601. It acknowledged that the experienced detective ought to have known better than to refer to the defendant's prior criminal history, but reasoned that the broad question had "specifically called for the response" provided, and that the error could have been avoided through narrow, leading questions. *Id.*

¶14 We similarly conclude that Lidster invited the error here. Like in *Stuard*, the erroneous testimony here was provided by a law enforcement officer who "should [have] underst[oo]d that such testimony is generally prohibited," *id.*, but Lidster unintentionally solicited it. Although Lidster points out that, unlike in *Stuard*, he asked a leading question, the answer, like in *Stuard*, was responsive—a yes-or-no answer would have been incomplete, and Lidster did not cut off the witness when the witness continued beyond his initial "no." And while Lidster contends that the circumstances here are distinguishable from *Stuard* because he did not learn of the problematic information in advance, we see no material difference; in either circumstance, "responsibility [for the testimony] lies with defense counsel." *Id.* at 600. Because Lidster invited the error, he cannot obtain relief on appeal. *See Escalante*, 245 Ariz. 135, ¶ 38.

Sufficiency of the Evidence

¶15 Lidster argues that insufficient evidence supported his convictions, contending that "there was no evidence presented that [he] provided [E.L.] with drugs" or had a "connection with . . . E.L.'s exposure to drugs," and that the state "failed to prove [his] connection with the drugs and paraphernalia." In analyzing sufficiency of the evidence, we view the evidence in the light most favorable to the verdicts, and affirm if substantial evidence supports them. *See State v. Tison*, 129 Ariz. 546, 552 (1981). "[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." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see State v. Mathers*, 165 Ariz. 64, 66 (1990). We will reverse a conviction for insufficient evidence only "[w]here there is a complete absence of probative facts to support" it. *Id.* We review

sufficiency of the evidence de novo. *State v. Harm*, 236 Ariz. 402, ¶ 11 (App. 2015).

¶16 Substantial evidence supported Lidster's conviction for negligent child abuse.[2] From ample evidence of Lidster's substance abuse and E.L.'s positive drug test, jurors could reasonably infer that Lidster, as the child's primary caretaker, had harmed or endangered her by negligently exposing her to the drug. *See* A.R.S. § 13-3623(B)(3) (providing for guilt if a person "having the care or custody of a child . . . causes or permits the person or health of the child . . . to be injured or . . . to be placed in a situation where the person or health of the child . . . is endangered"). The other unsafe and unsanitary conditions found in Lidster's home, including the presence of paraphernalia caked with residue in an open location, strengthened that inference.

¶17 The possession convictions are similarly supported by sufficient evidence. Although the mere presence of the items at Lidster's home would have been insufficient to hold him criminally liable for them, *see State v. Gonsalves*, 231 Ariz. 521, ¶¶ 10-11 (App. 2013), there was evidence here such that "the inference he knew of its existence and its presence where found may be fairly drawn," *State v. Villalobos Alvarez*, 155 Ariz. 244, 246 (App. 1987) (quoting *Carroll v. State*, 90 Ariz. 411, 413 (1962)). Although the items in the junk car were not readily observable, they were at Lidster's home in a commonly accessible area—not in Thompson's private quarters. Evidence such as Lidster's admitted intravenous drug use, the paraphernalia found throughout the home, and his child's exposure to heroin suggested Lidster's involvement with the drugs found in the safe. And the fact that the key to the safe was found on the same keychain as Lidster's car key could be reasonably taken to suggest that he had access to the safe and knew of its contents. Although Thompson's actual possession of drugs and the safe key may have suggested that Thompson also possessed the drugs, it was unnecessary for the state to prove that Lidster exclusively possessed the drugs. *See State v. Saiz*, 106 Ariz. 352, 355 (1970) (drug "[p]ossession may be jointly by two or more persons"; "[e]xclusive possession is not required").

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[2]We again decline to find the issue waived. Despite the state's contention otherwise, Lidster has not improperly "incorporate[d] by reference" his trial court motion; he has explicitly repeated his trial court argument in his opening brief. The argument, although sparse, is sufficient to avoid waiver.

¶18 Moreover, even if a juror were to conclude that Thompson may have controlled the drugs to the exclusion of Lidster, substantial evidence supported Lidster's criminal liability as Thompson's accomplice. Relevant here, a person is criminally liable as an accomplice if the person "[a]ids, counsels, agrees to aid or attempts to aid another person in . . . committing an offense" or "[p]rovides means . . . to commit the offense," "with the intent to promote or facilitate the commission of [the] offense." A.R.S. §§ 13-301, 13-303(A)(3). A juror could reasonably conclude that Lidster aided Thompson's possession of drugs for sale by allowing Thompson to use his home to store them. Lidster's evident involvement in drugs himself provided evidence that he intended to facilitate possession of the drugs and paraphernalia by providing the aid and means to possess them. *See State v. Noriega*, 187 Ariz. 282, 286 (App. 1996) (intent of accomplice may be inferred from defendant's "behaviors and other circumstances surrounding the event"). The weaponry and surveillance system at Lidster's house—particularly in light of the fact that the house contained little of apparent value other than the drugs—bolstered an inference that Lidster knew of the drugs and intended to protect them or aid Thompson in doing so. In sum, sufficient evidence supported Lidster's drug and paraphernalia possession convictions.

Sentencing Error

¶19 As the state correctly notes in its answering brief, the trial court erroneously denominated Lidster's negligent child abuse conviction as a dangerous crime against children. *See* A.R.S. §§ 13-705(Q)(1)(h), 13-3623(A)(1) (child abuse is dangerous crime against children if intentional or knowing and "[u]nder circumstances likely to produce death or serious physical injury"). As the state points out, however, the 4.5-year sentence imposed is nonetheless authorized under A.R.S. § 13-703(C), (J), given Lidster's historical prior felony convictions and the aggravating factors found by the court.[3]

¶20 Because the sentence imposed is aggravated as the court intended and Lidster has not contested the propriety of the 4.5-year sentence, we exercise our authority under A.R.S. § 13-4037(A) to amend the sentencing order. *See State v. Neese*, 239 Ariz. 84, ¶ 24 (App. 2016). We modify Count Six by removing the designation as a dangerous crime against children and replacing the citations to § 13-705 with a citation to § 13-703(J).

[3]Lidster waived his right to have a jury find aggravating factors.

¶21 We also note that the sentencing order incorrectly cites § 13-3623(A)(1) as the offense of conviction for Count Six. Although Lidster had been charged with violating that statute, which requires "circumstances likely to produce death or serious physical injury," *id.*, the trial court granted Lidster's motion under Rule 20, Ariz. R. Crim. P., to acquit on that charge. The trial court allowed the jury to consider Count Six under § 13-3623(B), a lesser offense that does not require circumstances likely to produce death or serious physical injury, and the jury found that he had negligently committed that lesser offense. *See* § 13-3623(B)(3). We therefore additionally correct the sentencing order to reflect that Lidster's conviction in Count Six is under § 13-3623(B)(3), rather than § 13-3623(A)(1).

Disposition

¶22 We modify the sentencing order as described above and otherwise affirm Lidster's convictions and sentences.