FILED BY CLERK
MAR 24 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JASON DOUGLAS BLESSIE, Appellant.	)	2 CA-CR 2008-0321 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200800172

Honorable James L. Conlogue, Judge

AFFIRMED

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E C K E R S T R O M, Presiding Judge.

¶1 Appellant Jason Blessie was convicted after a jury trial of possessing methamphetamine for sale, transporting methamphetamine for sale, and possession of drug paraphernalia. The trial court sentenced him to concurrent, aggravated fifteen-year prison terms for transporting and possessing methamphetamine, and an aggravated 4.5-year term for possession of drug paraphernalia, to be served consecutively to the fifteen-year terms. He argues the court erred when it denied his motions to suppress evidence and for judgment of acquittal, failed to preclude evidence based on a disclosure violation, and sentenced him to a consecutive term for paraphernalia possession. He also contends his Sixth Amendment right to a jury trial was violated when he was convicted by eight jurors rather than twelve and when the aggravating factors relied on by the trial court in sentencing him were not found by a jury. Finding no error, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the convictions. *State v. Huffman*, 222 Ariz. 416, ¶ 2, 215 P.3d 390, 392 (App. 2009). A Sierra Vista police officer stopped the truck Blessie was driving for a suspected traffic violation. After approaching the truck, the officer noticed Blessie's two passengers "kept moving their hands down to their waistband areas where [the officer] could not see them." Throughout the traffic stop, Blessie exhibited behaviors "consistent with someone who's extremely nervous about being stopped by police."

¶3 The officer then used a drug-detection dog to perform a sniff search. The dog alerted to the presence of drugs in or on the truck, on Blessie's person, and on the female passenger. During a subsequent search of the passenger compartment of the

vehicle, the officer found marijuana inside a fast-food bag and arrested the occupants of the truck. The officer then obtained a warrant to search the truck more comprehensively. Pursuant to that search, the officer found two large plastic bags containing "[a] large quantity of methamphetamine" stuffed into the roof of the truck's cab. He also found a small plastic bag containing methamphetamine in a tool box in the bed of the truck.

¶4 A Cochise County grand jury indicted Blessie on four counts related to the drugs found in the vehicle. The trial court granted his motion for judgment of acquittal for possession of marijuana, and the jury convicted him of the remaining counts. The court sentenced Blessie to a combined term of 19.5 years' imprisonment, and this appeal followed.

Motion to Suppress Evidence

¶5 Blessie argues the trial court erred when it denied his motion to suppress the evidence found in the truck because the state failed to prove the drug-detection dog used to obtain probable cause in this case is generally reliable.[1] When reviewing a motion to suppress, we consider only the evidence presented at the suppression hearing, which we view in the light most favorable to upholding the court's ruling. *State v. Esser*,

[1]To the extent he argues the state committed a disclosure violation by "fail[ing] to produce full records regarding the canine in this case, . . . and fail[ing] to disclose full records to the defense," he has not developed the argument properly. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (appellant's argument must contain citation to authorities and record and identify appropriate standard of review). Moreover, a disclosure violation is not a ground for application of the exclusionary rule based on illegally obtained evidence, the only matter typically addressed in a pretrial motion to suppress evidence. *See State v. Bejarano*, 219 Ariz. 518, ¶¶ 3-4, 12, 200 P.3d 1015, 1017, 1019 (App. 2008) (affirming definition of "motion to suppress" in state's appeal statute as challenging "'only the constitutionality of the obtaining of evidence by the state'"), *quoting State v. Lelevier*, 116 Ariz. 37, 38, 567 P.2d 783, 784 (1977) (emphasis omitted).

205 Ariz. 320, ¶ 3, 70 P.3d 449, 451 (App. 2003). We defer to the trial court's factual findings but review its legal conclusions de novo. *Id.*

¶6 At the suppression hearing, the officer who handled the drug-detection dog testified that his dog, Goliath, had been trained and certified by a national organization to detect the scent of illegal drugs. The officer testified he and Goliath had trained together, had been certified and recertified together, and had worked together as a team for two years. Based on his memory and records he had kept as the dog's handler, the officer stated that Goliath had "false[ly] alert[ed]"—indicated the presence of drugs where none were later found—"less than five percent" of the time.

¶7 Generally, under Arizona law, a trained drug-detection dog's alert provides probable cause to search a vehicle without a warrant. *State v. Box*, 205 Ariz. 492, ¶ 14, 73 P.3d 623, 627 (App. 2003); *State v. Weinstein*, 190 Ariz. 306, 310-11, 947 P.2d 880, 884-85 (App. 1997). But our courts have not articulated any concrete standards to assess whether a particular dog's training and performance justify treating its alert as probable cause justifying a search. Other courts have held a drug-detection dog's reliability must be established for an alert to support probable cause, but have not specified what degree of reliability is required. *E.g.*, *United States v. Lingenfelter*, 997 F.2d 632, 639 (9th Cir. 1993); *see United States v. Diaz*, 25 F.3d 392, 394 (6th Cir. 1994) ("Courts have not definitively addressed the issue of the quality or quantity of evidence necessary to establish a drug detection dog's training and reliability.").

¶8 Blessie contends, without authority, that the state must "show[] that the dog and handler were trained, that the dog actually alerted, and that that alert is a reliable

indicator of the presence of drugs." Relying on *Lingenfelter*, he appears to be arguing the state did not satisfy the third element of this test because it did not establish the dog was reliable. In *Lingenfelter*, the search warrant application stated the dog "ha[d] never given a false alert or failed to detect the drug and narcotic training aids [he had been] asked to find," and the court affirmed the magistrate's finding of probable cause. 997 F.2d at 639. But the court did not address the question whether a dog's less-than-perfect record would have been sufficient to establish its reliability. *Id.* The dog's rate of accuracy was stated in the search warrant application and not directly challenged thereafter. *Id*.

¶9 Here, however, the trial court acknowledged "the reliability of the dog's actions" was an issue in deciding the motion to suppress. Blessie cross-examined the dog handler extensively about the dog's training and rate of false-positive alerts. *See Diaz*, 25 F.3d at 394 (any evidence "that may detract from the reliability of the dog's performance properly goes to the 'credibility' of the dog"); *cf. State v. Bronson*, 204 Ariz. 321, ¶ 15, 63 P.3d 1058, 1062 (App. 2003) (in confrontation clause context, reliability of evidence tested by rigorous cross-examination).

¶10 Blessie focuses on the evidence from the dog's activity log that showed Goliath occasionally had alerted when no drugs later were found. But the officer testified the dog's alert indicates the odor of drugs are present, not necessarily the drugs themselves. And in some of the instances Blessie emphasizes, drugs were found on the person who was the subject of the encounter or the person admitted recently consuming drugs, even though drugs were not found where the dog had alerted. The officer estimated such instances happened about "five percent" of the time.

¶11 At any rate, the state need not establish the potential presence of contraband with certainty to show the probable cause necessary to secure a warrant. *See Diaz*, 25 F.3d at 396 (noting very low percentage of false positives not fatal to establishing probable cause); *cf. Guerrera*, 554 F.2d at 989 (acknowledging evidence of dog's training and behavior "falls short of conclusively establishing that the contraband in the car had been marijuana or cocaine, or that the contraband had been in the car since the car had been in appellant's possession"). The trial court implicitly found the dog's alert was sufficiently reliable to have provided the officers probable cause to search the vehicle. *See State v. Teagle*, 217 Ariz. 17, ¶ 19, 170 P.3d 266, 271 (App. 2007) (deferring to trial court's findings on credibility). Based on the record before us, there is ample evidence to support that finding and we find no abuse of discretion.

¶12 In a related argument, Blessie contends the state's "failure to disclose all the training and activity records of [the dog] . . . may or may not have shown further unreliability." As discussed, Goliath's handler testified about the dog's training and certification. The state also produced voluminous records of Goliath's daily activity, and Blessie used these records to cross-examine the dog's handler. Blessie has cited no authority for the proposition that the state was required to submit further documentation of the dog's training to prove its reliability, nor are we aware of any such authority. Importantly, the potential for erroneously identifying scents is not limited to dogs, and, in Arizona, neither a quantified risk of error nor more exhaustive foundational testimony has been required in order for the odor of drugs to support a probable cause determination. *See State v. Warren*, 121 Ariz. 306, 309, 589 P.2d 1338, 1341 (App.

1978) (officer's avowal he smelled burnt marijuana in pipe and home and had been trained to detect it established probable cause to issue search warrant); *see also United States v. Boxley*, 373 F.3d 759, 761 (6th Cir. 2004) ("[I]n order to admit evidence of a dog's alert to an aroma of drugs, it is not necessary to provide the dog's training and performance records, as it is similarly unnecessary to qualify a human expert in this way."); *Diaz*, 25 F.3d at 396 (testimony of handler alone sufficient to establish drug-detection dog trained and reliable). Thus, the trial court did not abuse its discretion in denying the motion to suppress evidence.

Disclosure Violation

¶13 Blessie argues the trial court erred when it failed to preclude the state from introducing evidence about the drugs found in the vehicle. On the first day of trial, Blessie moved to preclude the evidence on the ground the state had failed to disclose the scientific test results and thereby violated Rule 15.1(b)(4), Ariz. R. Crim. P. We review for an abuse of discretion a trial court's determination about the adequacy of disclosure, but review de novo the question of law regarding the scope of disclosure required under Rule 15.1. *State v. Roque*, 213 Ariz. 193, ¶ 21, 141 P.3d 368, 380 (2006).

¶14 Rule 15.1 requires the state to "make available to the defendant . . . material and information within the prosecutor's possession or control[, including] . . . results of . . . scientific tests, experiments or comparisons that have been completed." Ariz. R. Crim. P. 15.1(b)(4). Blessie contends the state violated the rule because it disclosed the opinion of the person who conducted the tests but not the information that formed the basis for the person's opinion. He contends he was entitled to the underlying test results,

which he could have challenged through his own expert. But, Blessie did not request further disclosure from the state, such as more detailed information about the test results; instead, he waited until the day of trial to ask the court to preclude the evidence. *See* Ariz. R. Crim. P. 15.4(e) ("All requests for disclosure required pursuant to Rules 15.1[(a)], 15.1[(b)] and 15.2[(c)] shall be made to the opposing party."). Rule 15.7(b) requires a party to attempt to "satisfactorily resolve the matter" with opposing counsel before seeking sanctions in the trial court. The trial court found the state had complied with the rule, stating it "underst[ood] the test results to be the single page or pages that were disclosed."

¶15 Blessie's reliance on *State v. Rodriguez*, 192 Ariz. 58, ¶¶ 31-33, 961 P.2d 1006, 1012 (1998), in support of his argument is unavailing. In *Rodriguez*, the state failed "to disclose the substance of [the fingerprint examiner's] opinion, along with related testing reports or other materials." *Id.* ¶ 32. And, the supreme court did not grant the defendant relief on that ground, but rather noted "[t]he record include[d] substantial support" for the defendant's argument the state had violated Rule 15.1. *Id.* ¶¶ 31-32.

¶16 Here, the trial court found the state's disclosure satisfied the rule. And we have not been provided the exhibit in the record on appeal, so must presume it supports the court's finding. *See State v. Villalobos*, 114 Ariz. 392, 394, 561 P.2d 313, 315 (1977) ("When an incomplete record is presented to an appellate court, it must assume that any testimony or evidence not included in the record on appeal supported the action taken by

the trial court."). The court did not err in finding the expert's report satisfied the requirements of the state's disclosure under Rule 15.1.[2]

Motion for Judgment of Acquittal

¶17 Blessie argues the trial court erred when it denied his motion for judgment of acquittal on the methamphetamine and paraphernalia charges. In reviewing for an abuse of discretion the trial court's denial of a motion for judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., we will reverse the court's ruling only if the conviction is not supported by substantial evidence. *State v. Henry*, 205 Ariz. 229, ¶ 11, 68 P.3d 455, 458 (App. 2003). "Substantial evidence is more than a mere scintilla and 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. DiGiulio*, 172 Ariz. 156, 159, 835 P.2d 488, 491 (App. 1992), *quoting State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990).

¶18 Citing this court's opinion in *State v. Harris*, 9 Ariz. App. 288, 290, 451 P.2d 646, 648 (1969), Blessie contends that "simply [his] presence . . . in his truck where unobviously placed narcotics were ultimately found" was insufficient evidence to support the charges, and the state needed "more evidence that the narcotics were [his]." However, the state was required to show Blessie knowingly possessed the

[2]Blessie also points out "the State failed to disclose the chain of custody sheets to the defense until only a few days prior to trial," contending it hampered defense counsel from "prepar[ing] or mak[ing] any challenge to the chain of custody." But the state proved the chain of custody of the drugs through the testimony of its witnesses at trial, and Blessie does not contend the state failed to establish the chain of custody. *See State v. Martinez-Villareal*, 145 Ariz. 441, 448, 702 P.2d 670, 677 (1985) (appellant must show prejudice from state's nondisclosure for reviewing court to find abuse of discretion).

methamphetamine and paraphernalia, not that they belonged exclusively to him.[3] *See* A.R.S. §§ 13-3407(A)(2), (7), 13-3415.[4] Knowing possession can be actual or constructive. *See Teagle*, 217 Ariz. 17, ¶ 41, 170 P.3d at 276. And, as the jury here was instructed, constructive possession means "the accused exercised dominion and control over the drug itself, or the location in which the substance was found." *Id*.; *see also* A.R.S. § 13-105(33) ("'[p]ossess'" defined as "knowingly . . . exercis[ing] dominion or control over property").[5]

¶19 The state presented more evidence of Blessie's knowledge of the drugs than his mere presence in the vehicle where such drugs were found. The jury heard testimony that Blessie was driving the truck in which the methamphetamine was found, the truck was registered to him, and he told the officer the truck "had been with him all night," and that "he was responsible for everything in the vehicle." *See Teagle*, 217 Ariz. 17, ¶ 44, 170 P.3d at 277 (jury can infer driver and sole occupant of vehicle containing large quantity of drugs knowingly possessed drugs). The drug-detection dog alerted on Blessie's hands and clothing, and Blessie was extremely nervous throughout the stop. *See Beijer v. Adams*, 196 Ariz. 79, ¶ 22, 993 P.2d 1043, 1047 (App. 1999) (evidence of

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[3]Blessie does not argue the state failed to prove any of the other elements of possession of methamphetamine, transportation of methamphetamine for sale, or possession of paraphernalia.

[4]The version of § 13-3407 in effect on March 6, 2008, when Blessie committed the offenses, is the same in relevant part. *See* 2005 Ariz. Sess. Laws, ch. 327, § 5.

[5]Although the subsection has been renumbered since Blessie committed the offenses, it is the same in relevant part. *See* 2006 Ariz. Sess. Laws, ch. 73, § 1 (former § 13-105(30)).

nervousness generally admissible to show person aware of unlawful conduct). Because this was sufficient evidence from which the jury could have found Blessie knowingly possessed and transported methamphetamine for sale, as well as the bags containing it, we find no error.

Consecutive Sentences

¶20 Blessie argues the trial court erred when it ordered the prison term for possession of methamphetamine drug paraphernalia to be served consecutively to the concurrent, fifteen-year terms on the conviction for transporting methamphetamine for sale and possession of methamphetamine. He contends he committed one act for purposes of A.R.S. § 13-116 and his sentence should be modified to concurrent terms on all counts. We review the propriety of consecutive prison terms de novo. *State v. Urquidez*, 213 Ariz. 50, ¶ 6, 138 P.3d 1177, 1179 (App. 2006). Section 13-116, provides:

> An act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent. An acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other, to the extent the constitution of the United States or of this state require.

¶21 To determine whether criminal offenses constitute the same or separate acts for purposes of § 13-116, we do not compare the elements of the offenses but focus instead on "the 'facts of the transaction.'" *State v. Price*, 218 Ariz. 311, ¶ 14, 183 P.3d 1279, 1283 (App. 2008), *quoting State v. Siddle*, 202 Ariz. 512, ¶ 17, 47 P.3d 1150, 1155 (App. 2002); *see also State v. Gordon*, 161 Ariz. 308, 313 n.5, 778 P.2d 1204, 1209 n.5 (1989). Plainly, the facts of these transactions are distinct. The state presented evidence

that the methamphetamine found in the truck's roof was packaged inside two plastic bags and the methamphetamine found in the toolbox was found inside a plastic bag along with a syringe packet. Thus, Blessie could have possessed either methamphetamine or drug paraphernalia—the plastic bag packaging—without possessing the other item; subtracting one of the two would not have negated the other offense. Blessie's possession of a dangerous drug and drug paraphernalia constituted two discrete offenses. Thus, the trial court did not err in ordering his sentences for these offenses served consecutively.

Aggravated Sentence

¶22 Blessie contends his right to jury trial was violated when the judge and not the jury found the aggravating circumstances. But Blessie acknowledges the well-established principle that a trial court may find a defendant has prior convictions and rely on that as an aggravating circumstance in imposing an aggravated prison term. *See Blakely v. Washington*, 542 U.S. 296, 301 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). And once a trial court properly has found the existence of a prior conviction, the court then can find additional aggravating factors without violating the defendant's constitutional right to jury trial. *See State v. Martinez*, 210 Ariz. 578, ¶ 26, 115 P.3d 618, 625 (2005). Here, the trial court found Blessie previously had been convicted of several felonies. It therefore did not err in finding other aggravating circumstances existed.

Right to Jury Trial

¶23 Blessie argues his Sixth Amendment right to a jury trial was violated because his jury contained only eight members rather than twelve. But Blessie does not contend the number of jurors was erroneous based on Arizona law, *see* Ariz. Const.

art. II, § 23; A.R.S. § 21-102(A); rather, he contends the Sixth Amendment requires every criminal trial have a jury of twelve persons.

¶24 But the United States Supreme Court has held that "the 12-man panel is not a necessary ingredient of 'trial by jury.'" *Williams v. Florida*, 399 U.S. 78, 86 (1970). And we are bound to follow United States Supreme Court precedent in "regard to the interpretation of the federal constitution." *Pool v. Superior Court*, 139 Ariz. 98, 108, 677 P.2d 261, 271 (1984). Accordingly, Blessie's right to a jury trial was not violated when an eight- person jury determined his guilt.

Disposition

¶25 For the foregoing reasons, Blessie's convictions and sentences are affirmed.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge