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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. CURT ANDREW RICCI, Appellant.	2 CA-CR 2008-0336 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20074248

Honorable Frank Dawley, Judge Pro Tempore

AFFIRMED AS MODIFIED

Robert J. Hirsh, Pima County Public Defender
By John F. Palumbo
Tucson
Attorneys for Appellant

H O W A R D, Chief Judge.

¶1 After a jury trial, appellant Curt Ricci was convicted of one count of sale or transfer of a narcotic drug, two counts of possession of drug paraphernalia, and one count

of possession of a narcotic drug for sale. The jury found him not guilty of count two of the indictment, a second charge of sale or transfer of a narcotic drug. Ricci admitted the state's allegations that he had one historical prior felony conviction and committed the charged offenses while on parole. The trial court sentenced him to presumptive, enhanced, and concurrent prison terms of 9.25 years on counts one and four and 1.75 years on counts three and five. Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967); *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969); and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), avowing he "reviewed the entire record and [was] unable to find any arguable legal issues to raise on appeal."[1] Ricci has filed a supplemental brief raising several issues. We affirm for the reasons stated below.

¶2 Ricci first contends there was insufficient evidence that he had committed two acts constituting the separate charges of sale of a narcotic drug alleged in counts one and two of the indictment. He argues that, because the jury acquitted him of the second count and because the undercover officer who purchased the cocaine testified the two transactions had occurred in exactly the same way, the verdicts were "split" and "unlawful as inconsistent as a matter of law." He asserts the jury could not have found him guilty on count one in light of its verdict of not guilty on count two.

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[1]Ricci's counsel notes that the sentencing minute entry incorrectly refers to "A.R.S. § 13-604.01 (PREDICATE FELONY)." He was sentenced under § 13-604 and § 13-604.02(B). Therefore, the sentencing minute entry is amended to delete any reference to § 13-604.01.

¶3 "In Arizona, a jury is not required to render consistent verdicts." *State v. Lewis*, 222 Ariz. 321, ¶ 10, 214 P.3d 409, 413 (App. 2009). It is well recognized that "juries sometimes compromise or exercise leniency when reaching their verdicts." *State v. McKenna*, 222 Ariz. 396, n.14, 214 P.3d 1037, 1048 n.14 (App. 2009). "[C]ourts will not speculate on [the] reasons for [a] jury's verdict[s]," *id*., and we will not do so here.

¶4 As part of this claim, Ricci also contends that, because the jury found him not guilty on count two, there was necessarily insufficient evidence to support the guilty verdict on count one. In a separate argument, he challenges the sufficiency of the evidence to support all the convictions, arguing the trial court "should have granted" his motion for judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P.

¶5 When evaluating a challenge to the sufficiency of the evidence, we view the evidence and all inferences from that evidence in the light most favorable to sustaining the guilty verdict. *State v. Jensen*, 217 Ariz. 345, ¶ 5, 173 P.3d 1046, 1049 (App. 2008). We will reverse a conviction based on such a challenge only if it clearly appears "that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987). Similarly, a motion for judgment of acquittal pursuant to Rule 20 should be granted only if, as the rule provides, "there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(a). Substantial evidence is proof that reasonable jurors could view as sufficient support for the jury's finding beyond a reasonable doubt that the defendant committed an offense. *State v.*

Mathers, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990). A Rule 20 motion should only be granted when "there is a complete absence of probative facts to support a conviction." *Id*. at 66, 796 P.2d at 868. There was abundant evidence here to support the jury's verdicts.

¶6 Tucson police officer Scott Glass testified he had been working undercover, investigating narcotics-related activity and prostitution in a certain area of Tucson "[b]ecause of the high narcotics complaints" for that area. Glass testified he had made contact with a prostitute named Angela at a convenience store. He stated, "[we] agreed on a prostitution deal, and I ask[ed] her if she knew where she could get crack cocaine for me." Angela made some telephone calls and directed Glass to a barbershop in a small strip mall. Glass testified further that he dropped Angela off at the barbershop, she went inside, and she came back outside with a male later identified as Ricci. Glass saw Angela give Ricci the money Glass had given to her, saw him "drop something in [Angela]'s hand," and watched him go back inside the barbershop. Angela brought Glass what was later identified as crack cocaine, and Glass gave her another twenty dollars to purchase more cocaine. Angela went back inside the barbershop and, according to Glass, "the same male that followed her out the first time followed her out again." Angela again gave the money to that person, who handed her more crack cocaine that she brought to Glass. Both times the cocaine was in a wadded-up gum wrapper. The evidence amply supported guilty verdicts on counts one and three, the latter for possession of drug paraphernalia.

¶7 There was also sufficient evidence to withstand the Rule 20 motion on the charge of possession of cocaine for sale and possession of drug paraphernalia as alleged in counts four and five. Glass testified that, after he had purchased the two packets of cocaine, and after he and Angela were stopped by surveillance officers, he was taken to a location where other officers had detained Ricci. Glass identified Ricci as the person he had seen going in and out of the barbershop, and he later identified Ricci in court as the same individual. Glass was "positive" Ricci was the same person.

¶8 When Ricci was detained and searched, he had in his possession the money Glass had given Angela and crack cocaine wrapped in a gum wrapper. The arresting officer testified he had felt something "crunchy" like cereal in Ricci's shorts as he was patting Ricci down for weapons and that a plastic baggie containing thirty-four grams of cocaine was subsequently found on the ground by Ricci's foot; after that, there was no longer anything "crunchy" in Ricci's shorts. This and other evidence amply supported the jury's guilty verdicts on the charges of possessing a narcotic drug for sale and possessing drug paraphernalia. The trial court did not abuse its discretion when it denied his Rule 20 motion as to all of the charges.[2] That the state did not introduce fingerprint evidence does not render

[2]Glass had used a "body bug" or recording device in the car he was driving; the record includes a compact disc on which is stored Glass's conversations with Angela and the comments Glass made to surveillance officers who were listening as the events unfolded. The recorded conversations were also transcribed, and the transcription, too, is part of the record on appeal. Glass's testimony at trial was consistent with the recorded and transcribed material.

the evidence insufficient, as Ricci suggests. Rather, as the trial court correctly observed when it denied the motion, although there were questions of fact "for the jury to decide," the state had presented substantial evidence that "would support guilty verdicts."

¶9 Ricci also contends the trial court abused its discretion and "violated [his] federal and state due process rights" when it denied what Ricci characterizes as his motion seeking to call latent fingerprint examiner Steve Skowron as a witness.[3] Ricci apparently supplemented his previous list of witnesses and added Skowron as a witness. The state filed a motion to strike Skowron as a witness on the ground that he had resigned from the Tucson Police Department after being accused of stealing narcotics evidence in six cases between December 2004 and January 2006. The investigation of Skowron was ongoing at the time of trial.

¶10 In a letter to defense counsel dated May 9, 2008, the prosecutor asked that counsel demonstrate how Skowron's testimony would be relevant, given that no latent fingerprint evidence was to be introduced at trial. According to the prosecutor, defense counsel did not respond to the letter. The state argued in its motion to strike that Ricci had "failed to comply with Rule 15.2(b) of the Arizona Rules of Criminal Procedure by failing to disclose what defense, if any, Mr. Skowron would serve to support." The prosecutor argued Skowron's alleged misconduct in other cases had nothing to do with this case and

[3]Ricci actually filed a "notice of defendant's amended witness list" on May 2, 2008, stating he had served the prosecutor with a supplement to Ricci's list of witnesses. Thus, Ricci gave the state notice of his intent to call Skowron as a witness but did not file a motion.

"[t]o allow the Defendant to call [him] at trial would amount to an abuse of process and would serve no purpose other than to embarrass and harass Mr. Skowron, and confuse the jury at trial." The trial court granted the state's motion after a hearing and ruled that "any mention of Steve Skowron is precluded."[4]

¶11 On the first day of trial, the judge and the parties discussed a pretrial ruling that had been entered by a different judge, clarifying the scope of that ruling. Although defense counsel stated she intended to point out to the jury the "variations in the lab[oratory] report and the amount of drugs turned in and the amount of drugs tested in this case," she acknowledged she was not to mention Skowron. She added, "That will be part of a Rule 20 motion." Referring to the earlier hearing on this issue, defense counsel explained that an unknown amount of drugs was missing and questioned whether the sample submitted for testing had been the correct one. The trial judge "affirm[ed]" the previous judge's ruling and addressed the related question of whether Ricci would be precluded from introducing any

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[4]In his supplemental brief, Ricci points out that the trial court held a hearing on this issue on July 21, 2008, and that the transcript from that hearing is not part of the record on appeal. He adds, "Appellant would ask that the Court expand the [record on appeal] to include" this hearing. The transcript of that hearing is not part of the presumptive record on appeal, Rule 31.8(b)(2), Ariz. R. Crim. P., and the request to expand the record to include the transcript, made for the first time in the footnote of a supplemental brief, is neither timely nor properly presented. *See* Ariz. R. Crim. P. 31.8(b)(4) (permitting party to enlarge record on appeal by filing in trial court notice of designation of additional portions of record); Ariz. R. Crim. P. 31.8(h) (permitting court of appeals to enlarge record on appeal by motion of party). Therefore, we presume the missing portion of the record supports the trial court's ruling. *See State v. Rivera*, 168 Ariz. 102, 103, 811 P.2d 354, 355 (App. 1990). Moreover, based on the record before us, the court did not abuse its discretion in precluding Skowron from testifying in any event, given the irrelevance of his proposed testimony.

evidence that at one time "someone in the lab had taken drugs." The court stated, "[N]o, you can't simply bring out the fact that there was some theft at one time as somehow an indication that there was a theft here." The court added that counsel would not be precluded from pointing out any discrepancies between the amount of drugs seized by police and the amount measured at the laboratory and presented as evidence at trial. Ricci now seems to argue that the court erred in precluding him from introducing the evidence about Skowron's theft of drugs and suggests he was prevented from introducing evidence that would have raised a question about whether the evidence had been tampered with and whether the testing process had been tainted.

¶12 We review the trial court's ruling on the relevance and admissibility of evidence for an abuse of discretion. *See State v. Aguilar*, 209 Ariz. 40, ¶ 29, 97 P.3d 865, 874 (2004); *State v. Jeffrey*, 203 Ariz. 111, ¶ 13, 50 P.3d 861, 864 (App. 2002). Based on the record before us, no such abuse occurred here. To the extent the trial court precluded Skowron from testifying because there was no fingerprint evidence in this case, the court was correct. Additionally, that Skowron had stolen evidence in other cases does not mean he did so here or that he tampered with the evidence in this case. And nothing in the record suggests that he had. Ricci was permitted to cross-examine the state's witnesses about the evidence and noted the discrepancies between the weight of the cocaine when it was first taken into evidence, which was 34.94 grams, and its reduced weight of 31.73 grams when it was tested by the state's criminalist, Quentin Peterson. Defense counsel pointed this out

during closing argument, suggesting to the jury someone had tampered with the evidence. Thus, the jury properly could consider this factor in weighing the evidence before it. The trial court did not abuse its discretion, nor were Ricci's due process rights violated.

¶13 Similarly, the trial court did not err, as Ricci contends, when it admitted into evidence the 31.73 grams of rock cocaine that had been in the bag found at Ricci's feet. Ricci contends that, because of the discrepancy in the weight of the cocaine and the differences in color, which suggested the drugs had originated from different communities, there was insufficient chain-of-custody evidence and it appeared the cocaine had been tampered with at some point. Therefore, he argues, there was insufficient evidence to support his conviction on count four.

¶14 We generally review "[a] trial court's conclusion that evidence has an adequate foundation . . . for an abuse of discretion." *State v. McCray*, 218 Ariz. 252, ¶ 8, 183 P.3d 503, 507 (2008). Ricci did not object to the admission of the evidence below on the ground he now raises, thereby having waived all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). Given the sufficient foundation evidence presented, the trial court did not err at all in admitting this evidence, much less fundamentally. Therefore, we reject this claim.

¶15 Ricci also asserts the trial court erred in admitting into evidence the photocopies of "buy" money and recovered "buy money," which was the forty dollars Glass had given to Angela. The bills were in Ricci's pocket when he was arrested. Ricci contends

Glass gave the money to Angela to "buy a sex act prior to the alleged drug buy in violation of the Fourth Amendment to the United States and State of Arizona Constitution."

¶16 First, although Ricci suggests he had filed a motion to suppress the copies of the bills on this ground, he filed no such motion. The copies of the original "buy money" were admitted without objection, and there was adequate foundation to support admission of this exhibit. The court initially agreed with Ricci that there was insufficient foundation to admit the recovered bills through the same officer, but an adequate foundation was established through a different officer, and the recovered bills were admitted properly without objection.

¶17 Ricci's cursory assertion that admission of this evidence violated his rights under the federal and state constitutions is unsupported and without merit. To the extent he is actually challenging the sufficiency of the evidence to support the jury's implicit finding that the money had been used to purchase cocaine rather than a sexual act, we reject that challenge. There was more than sufficient evidence to support that finding.

¶18 The transcript of the recorded conversation between Glass and Angela establishes Angela had asked Glass to prove he was not a police officer before she would agree to engage in any act of prostitution.[5] When Glass asked her what he had to do, she responded, "[T]ouchy-feely," explaining, "I'll touch you, but you gotta go up in." Ricci

[5]Portions of the recording were played for the jury, and the jurors were given a copy of the transcript of the recorded conversation.

contends it was this that Glass had paid Angela for, not for the purchase of drugs. Whatever physical encounter may have taken place, the jury reasonably could find, based on Glass's testimony and the recorded conversation, that Glass did not pay Angela for any such encounter. Rather, Glass told Angela shortly after that exchange that he would like to buy cocaine "[t]o party a little better." Angela made some telephone calls and directed Glass to the barbershop; Glass gave Angela the first twenty dollars before they stopped at the barbershop, about twenty minutes before the first transaction; and Angela then obtained the first packet of crack cocaine from Ricci. There was ample evidence from which reasonable jurors could find the money had been used to purchase drugs, not a sexual act. And, as we have noted repeatedly, substantial evidence supported the guilty verdicts.

¶19 We have reviewed the entire record for fundamental, reversible error and have found none, other than the error in the sentencing minute entry. Therefore, we affirm the convictions and the sentences imposed and modify the sentencing order as provided herein.

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JOSEPH W. HOWARD, Chief Judge

CONCURRING:

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PHILIP G. ESPINOSA, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge