

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

PERLA MARINA REIS,
Appellant.

No. 2 CA-CR 2013-0431
Filed December 19, 2014

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NOT FOR PUBLICATION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); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County

No. CR20130364001

The Honorable Christopher C. Browning, Judge

AFFIRMED IN PART; VACATED IN PART; REMANDED

COUNSEL

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STATE v. REIS
Decision of the Court

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Miller and Chief Judge Eckerstrom concurred.

ESPINOSA, Judge:

¶1 After a jury trial, Perla Reis was convicted of one count of possession of marijuana for sale, one count of attempted transportation of marijuana for sale, and one count of possession of drug paraphernalia. The trial court imposed substantially mitigated, concurrent sentences on counts one and two, the longest of which was a three-year prison term, followed by three years' probation on the third count. On appeal, Reis challenges the sufficiency of the evidence underlying her convictions. She also argues her conviction for possession of marijuana for sale violates federal and state double jeopardy clauses. Lastly, she asserts the court's imposition of probation on count three, to be served consecutively to the other counts, violates Arizona's double punishment statute, A.R.S. § 13-116.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to upholding the challenged convictions. *See State v. Sarullo*, 219 Ariz. 431, ¶ 2, 199 P.3d 686, 688 (App. 2008). In December 2012, United States Postal Inspectors and a South Tucson Police Officer were conducting surveillance outside a shipping store in Tucson. Around 3:30 p.m., they saw Reis park her vehicle in front of the store and get out and remove a white priority parcel box from the trunk. The box "looked like it had a little weight to it," requiring Reis to use both hands to lift it. The inspectors also could see that the box was "glued shut" and "sealed the way around," consistent with other drug mailings. Reis "appeared to be looking around, [a] little nervous."

¶3 Reis walked into the store with the box, followed a few minutes later by the postal inspectors. Once inside, they observed

STATE v. REIS
Decision of the Court

Reis standing at a counter, writing on greeting cards, but, on closer inspection, she was “not actually writing anything.” The box was sitting on the floor, a few feet away from Reis and no postage had yet been applied. One of the inspectors could see that it was to be delivered to a location in Madsen, Alabama, and had a Miami return address. Another then picked up the box and noted it had a “solid feel.”

¶4 The postal inspectors identified themselves and Reis agreed to speak with them. She appeared “very nervous,” “looking around, not able to focus” on the inspector questioning her. When asked about the contents of the box, Reis “got very nervous[,] . . . and said she did not know for sure, and . . . hinted it was something she thought could be suspicious.” The inspectors read Reis her rights pursuant to *Miranda*,¹ after which she agreed to further questioning. Reis claimed to have been paid fifty dollars to mail the package by a man in the park, but she declined to provide the man’s name or the name of the park. The inspectors asked her several times about the contents of the box, but she would not “say what was inside or what she thought it could be,” only responding “she had an idea there was something suspicious or illegal.” Reis also admitted mailing a similar parcel at the same location a few days before. After saying she “took responsibility” for the contents of the parcel, Reis was released.

¶5 At the postal service’s inspection office, a certified drug-detection dog reacted to the box, and the inspectors obtained a search warrant to open it. Inside, they discovered 5.35 pounds of marijuana in vacuum seal bags and wrapped in cellophane.

¶6 Reis was indicted for possession of marijuana for sale, attempted transportation of marijuana for sale, and possession of drug paraphernalia. At trial, following the close of the state’s case, Reis moved for a verdict of acquittal based on the “lack of any evidence [she] knew that the package contained marijuana.” Ruling there was substantial evidence from which the jury could find the

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

STATE v. REIS
Decision of the Court

defendant guilty of the crime charged, the trial court denied the motion.

¶7 Reiss then testified in her defense, stating that “a friend of a friend” gave her fifty dollars to mail the package, which she had picked up from another friend’s home. She said she lied to the officers when she told them she was given the box by a man in a park. When asked to identify the individual who gave her the box or provide the address where she had received it, she declined, asserting she was “scared” that the man might “do[] something to me or my family.” She further denied shipping a similar box a few days before and telling the inspector that she had done so. Reiss maintained she had “no idea what was in the package.” She was subsequently convicted and sentenced as described above. We have jurisdiction over her appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Denial of Rule 20 Motion

¶8 Reiss first argues the trial court erred in denying her Rule 20, Ariz. R. Crim. P., motion for a judgment of acquittal, claiming there was no evidence she knew the package contained marijuana. We evaluate *de novo* the question of whether the evidence was sufficient to withstand a Rule 20 motion. *State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011). We review a trial court’s denial of a Rule 20 motion for an abuse of discretion, *State v. Latham*, 223 Ariz. 70, ¶ 9, 219 P.3d 280, 282 (App. 2009), considering all of the evidence presented at trial, *State v. Marchesano*, 162 Ariz. 308, 312, 783 P.2d 247, 251 (1989) (where defendant presents case following denial of Rule 20 motion, sufficiency of evidence determined by all evidence), *overruled on other grounds*, *State v. Phillips*, 202 Ariz. 427, n.4, 46 P.3d 1048, 1057 n.4 (2002); *see also State v. Nunez*, 167 Ariz. 272, 279, 806 P.2d 861, 868 (1991) (“defendant who goes forward and presents a case waives any error if his case supplies evidence missing in the state’s case”).

¶9 Rule 20(a) provides “the court shall enter a judgment of acquittal of one or more offenses charged . . . if there is no substantial evidence to warrant a conviction.” Our supreme court has held “substantial evidence” to mean “such proof that

STATE v. REIS
Decision of the Court

'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990), quoting *State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980). Both direct and circumstantial evidence are considered in determining whether substantial evidence supports a conviction. *West*, 226 Ariz. 559, ¶ 16, 250 P.3d at 1191. On a Rule 20 motion, "'the 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.* (emphasis omitted), quoting *Mathers*, 165 Ariz. at 66, 796 P.2d at 868. Further, "'[w]hen reasonable minds may differ on inferences drawn from the facts, the case must be submitted to the jury, and the trial judge has no discretion to enter a judgment of acquittal.'" *Id.* ¶ 18, quoting *State v. Lee*, 189 Ariz. 590, 603, 944 P.2d 1204, 1217 (1997).

¶10 Section 13-3405(A), A.R.S., provides: "A person shall not knowingly: 1. Possess or use marijuana. . . . Transport for sale . . . marijuana." "Knowingly" means "that a person is aware or believes that the person's conduct is of that nature or that the circumstance exists." A.R.S. § 13-105(10)(b). Under § 13-3405, the state must prove the defendant knew he or she possessed or transported marijuana, rather than some other drug. See *State v. Fierro*, 220 Ariz. 337, ¶ 5, 206 P.3d 786, 788 (App. 2008) (proof of knowledge that drug was marijuana required for conviction of transporting marijuana under § 13-3405(A)(4)); *State v. Norris*, 221 Ariz. 158, ¶ 8, 211 P.3d 36, 39 (App. 2009) (same). The knowledge element, however, may be satisfied if the defendant "was aware of the high probability that the package [he or she possessed] contained marijuana," and "acted with conscious purpose to avoid learning the true contents of the package[]." *Fierro*, 220 Ariz. 337, ¶¶ 5-6, 206 P.3d at 788.

¶11 Based on the totality of the circumstantial evidence here, reasonable jurors could have inferred that Reis knew the package contained marijuana. *State v. Gaines*, 113 Ariz. 206, 208, 549 P.2d 574, 576 (1976) ("Of necessity, proof of intent or knowledge must often be established by circumstantial evidence."), overruled on other grounds by *State v. Avila*, 127 Ariz. 21, 617 P.2d 1137 (1980).

STATE v. REIS
Decision of the Court

First, the package was in Reis's actual possession and under her exclusive control, and the jury was not required to credit her claim that, unlike most people who mail packages, she did not know the nature of its contents. *See, e.g., State v. Teagle*, 217 Ariz. 17, ¶ 44, 170 P.3d 266, 277 (App. 2007) ("A jury may properly infer that a driver and sole occupant of a vehicle containing a large amount of drugs was aware that the drugs were in the vehicle."); *Beijer v. Adams ex rel. County of Coconino*, 196 Ariz. 79, ¶ 25, 993 P.2d 1043, 1048 (App. 1999) (presence of drugs in trunk of car defendant driving sufficient, "in and of itself," to support conclusion beyond reasonable doubt defendant knowingly transported drugs). Additionally, Reis exhibited nervous behavior entering the store and when questioned by inspectors, she refused to identify the person who had given her the package or disclose where the transaction occurred. Furthermore, she had received payment for shipping the package, which was glued and sealed in an unusual manner; she admitted previously mailing a similar package for the same individual; she told the officers she accepted responsibility for its contents; and, at trial she admitted lying to the officers about where she had acquired the package.

¶12 Finally, the jury could directly evaluate Reis's testimony and credibility when she testified in court. *See United States v. Woodard*, 459 F.3d 1078, 1087 (11th Cir. 2006) ("[A] defendant's testimony—if disbelieved by the jury—may be considered substantive evidence of guilt."); *Fierro*, 220 Ariz. 337, ¶¶ 8-9, 206 P.3d at 788 (whether defendant acts "knowingly and intentionally" is credibility judgment for jury to make). In view of all the circumstances, there was substantial evidence from which the jury could find Reis guilty of the crime charged.

Double Jeopardy

¶13 Reis next contends her conviction for attempted transportation of marijuana for sale and possession of marijuana for sale violates double jeopardy principles. The state agrees, as do we. Reis's convictions for attempted transportation of marijuana for sale and possession of marijuana for sale arise from a single quantity of marijuana and, because they are based on the same transaction, violate the Double Jeopardy Clause and constitute fundamental,

STATE v. REIS
Decision of the Court

prejudicial error. *See State v. Chabolla-Hinojosa*, 192 Ariz. 360, ¶¶ 8, 12, 965 P.2d 94, 96-97 (App. 1998) (“[A] conviction of possessing for sale the same marijuana one is convicted of transporting for sale violates the double jeopardy clause.”);² *State v. Brown*, 217 Ariz. 617, ¶ 13, 177 P.3d 878, 882 (App. 2008) (double jeopardy violation occurs even if concurrent sentences imposed on convictions because an additional felony conviction itself constitutes punishment); *see also State v. Ortega*, 220 Ariz. 320, ¶ 7, 206 P.3d 769, 772 (App. 2008) (double jeopardy violation constitutes fundamental, prejudicial error reviewable on appeal despite not having been raised below).

¶14 Under Arizona law, when two convictions cannot stand under governing legal standards, we generally vacate the conviction resulting in the lesser sentence.³ *See State v. Ballez*, 102 Ariz. 174, 175, 427 P.2d 125, 126 (1967) (where defendant received two concurrent sentences on two counts “based on a single, definite act, the remedy is to retain the convictions and to remove the lesser sentence”); *State v. Jones*, 185 Ariz. 403, 407, 916 P.2d 1119, 1123 (App. 1995) (same). Reis was sentenced to three years’ imprisonment for possession of marijuana for sale and two years’ imprisonment for attempted transportation of marijuana for sale. *See State v. Castro*, 27 Ariz. App. 323, 329, 554 P.2d 919, 925 (1976) (where only one conviction can stand and the actual sentences imposed are not the same, “the lesser sentence has been imposed for the lesser conviction”). We therefore

²We note but do not address here the question whether possession of marijuana is necessarily a lesser-included offense of attempted transportation of marijuana. The state has conceded the issue and its resolution would not alter Reis’s sentence.

³Reis asserts her conviction for possession of marijuana for sale should be vacated as the “lesser-included offense.” As the state observes, however, “lesser offense” is distinguished from “lesser-included offense.” *Compare State v. Jones*, 185 Ariz. 403, 407, 916 P.2d 1119, 1123 (App. 1995) (describing “lesser” conviction to be vacated in double jeopardy context), *with State v. Chabolla-Hinojosa*, 192 Ariz. 360, ¶¶ 11-12, 965 P.2d 94, 96-97 (App. 1998) (describing lesser-included offense). In most cases, the lesser-included offense would carry the lesser sentence and thus be the conviction vacated.

STATE v. REIS
Decision of the Court

vacate her conviction and sentence for attempted transportation of marijuana for sale.

Double Punishment

¶15 Finally, Reis contends the imposition of probation on the possession of drug paraphernalia count,⁴ to be served consecutively to the other counts, constitutes double punishment for the same act and thus violates A.R.S. § 13-116 and is an illegal sentence.⁵ Section 13-116 states in pertinent part: “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.” See *State v. Siddle*, 202 Ariz. 512, ¶ 16, 47 P.3d 1150, 1155 (App. 2002) (§ 13-116 prohibits consecutive sentences for single act). We review de novo whether consecutive sentences are permissible under § 13-116. *Id.*

¶16 To determine whether a single criminal episode can result in multiple punishments, we employ the analytical framework set out in *State v. Gordon*, 161 Ariz. 308, 315, 778 P.2d 1204, 1211 (1989). Pursuant to *Gordon*, courts should

judge a defendant’s eligibility for
consecutive sentences by considering the
facts of each crime separately, subtracting

⁴The indictment alleged “possess[ion of] drug paraphernalia, to wit: box and/or vacuum wrap and/or plastic bags, in violation of A.R.S. § 13-3415(A).”

⁵Reis concedes she did not object below to the imposition of the consecutive sentence for the possession of drug paraphernalia count. She correctly notes, however, that a consecutive sentence imposed in error constitutes an illegal sentence, which is fundamental, prejudicial error. See *State v. Martinez*, 226 Ariz. 221, ¶ 17, 245 P.3d 906, 909 (App. 2011) (imposition of consecutive sentences in violation of A.R.S. § 13-116 creates an illegal sentence and fundamental error); see also *State v. McPherson*, 228 Ariz. 557, ¶ 4, 269 P.3d 1181, 1183 (App. 2012) (illegal sentence constitutes fundamental, prejudicial error).

STATE v. REIS
Decision of the Court

from the factual transaction the evidence necessary to convict on the ultimate charge—the one that is at the essence of the factual nexus and that will often be the most serious of the charges. If the remaining evidence satisfies the elements of the other crime, then consecutive sentences may be permissible under A.R.S. § 13-116. In applying this analytical framework, however, we will then consider whether, given the entire “transaction,” it was factually impossible to commit the ultimate crime without also committing the secondary crime. If so, then the likelihood will increase that the defendant committed a single act under A.R.S. § 13-116. We will then consider whether the defendant's conduct in committing the lesser crime caused the victim to suffer an additional risk of harm beyond that inherent in the ultimate crime. If so, then ordinarily the court should find that the defendant committed multiple acts and should receive consecutive sentences.

Id.; see also *State v. Runningeagle*, 176 Ariz. 59, 67, 859 P.2d 169, 177 (1993) (describing *Gordon* as applying a three-part test).

¶17 Here, the crime “at the essence of the factual nexus,” could be considered either attempted transportation of marijuana or possession of marijuana. *Gordon*, 161 Ariz. at 315, 778 P.2d at 1211; *State v. Alexander*, 175 Ariz. 535, 537, 858 P.2d 680, 682 (App. 1993) (ultimate crime “will usually be the primary object of the episode”). The drug paraphernalia at issue—box, vacuum wrap, and plastic bags—served to carry out the primary object of the episode to possess and transport the marijuana. Subtracting the packaging materials as necessary to convict on the ultimate crime, there is insufficient evidence to support a conviction for possession of drug paraphernalia. And, as the state concedes, it “would be factually

STATE v. REIS
Decision of the Court

impossible in this case for Reis” to commit the “ultimate crime,” *Gordon*, 161 Ariz. at 315, 778 P.2d at 1211, “without also possessing the packaging material.” The consecutive term of probation imposed by the trial court on count three, possession of drug paraphernalia, was therefore impermissible and we remand for resentencing on this count.

Disposition

¶18 In accord with the foregoing, Reis’s conviction and sentence for attempted transportation of marijuana for sale is vacated; her conviction for possession of drug paraphernalia is affirmed but remanded for resentencing. Her remaining conviction and sentence on count one, possession of marijuana for sale, are affirmed.