STATE OF ARIZONA v. JEFFREY LEE LIDSTER

2021 | Cited 0 times | Court of Appeals of Arizona | January 21, 2021

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

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 See State v. Molina, 211 Ariz. 130, ¶ 2 (App. 2005). On July 2, 2018, police and the Department of Child Safety (DCS) visited to check on the welfare of 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, 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 d 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 d a search warrant. As police surveilled the home on August 15 and prepared to 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 police found a key to a safe.

¶5 e, police found methamphetamine and

Cotton swabs were 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 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 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).

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 story constituted error, but contends that Lidster invited it because his counsel asked the . 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 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 by insufficient argument. 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:

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 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 , and although the question could have been answered Lidster had not stopped the witness when the witness continued .

¶11 introducing forbidden evidence and then seeking reversal based on its

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 Id. at 600-01. the defendant cannot obtain appellate relief even if the error was

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 had. Id. at 600. Defense counsel then Id. The detective replied that Lidster

had mentioned Id. (emphasis omitted).

¶13 Our supreme court concluded that the error was invited, Id. at 601. It acknowledged that the experienced detective ought to have known better 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 stimony 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 . 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, [for the testimony] lies 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 there was no evidence presented that [he] provided [E.L.] with drugs connection with . . . 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). 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 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 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 conviction for negligent child abuse. 2 and E.L. infer that Lidster,

as

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 . . . 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 endangere . The other unsafe and unsanitary conditions found in 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 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 home in a commonly accessible area not in

Evidence such as admitted intravenous drug use, the paraphernalia found throu heroin with the drugs found in the safe. And the fact that the key to the safe was found on the same keychain as could be reasonably taken to suggest that he had access to the safe and knew of its contents. Alt 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) (d [p] ;).

2 We again decline to find the issue waived. 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 . 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 . . . to commit the offense,

A.R.S. §§ 13-301, 13-303(A)(3). A juror could reasonably conclude that drugs for sale by allowing Thompson to use his home to store them. 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 behaviors and other circ The weaponry and surveillance

system 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. drug and paraphernalia possession convictions.

Sentencing Error

¶19 As the state correctly notes in its answering brief, the trial 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). As the state points out, however, the 4.5-year sentence

imposed is nonetheless authorized under A.R.S. § 13-703(C), (J), given 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 id., the 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 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