

Cite as 2023 Ark. App. 433

## ARKANSAS COURT OF APPEALS

DIVISION I  
No. CR-22-667

DAVID WAYNE RAILEY

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered October 4, 2023

APPEAL FROM THE NEVADA  
COUNTY CIRCUIT COURT  
[NO. 50CR-20-38]

HONORABLE DUNCAN CULPEPPER,  
JUDGE

AFFIRMED

**N. MARK KLAPPENBACH, Judge**

Appellant, David Wayne Railey, appeals his convictions for possession of more than ten grams of methamphetamine, possession of drug paraphernalia (plastic bags to pack or repack methamphetamine), and possession of methamphetamine within one thousand feet of a church.<sup>1</sup> Railey argues on appeal that the State failed to present sufficient evidence that he was in constructive possession of the contraband; that his acquittal on possession of the drugs with the purpose to deliver foreclosed any conviction for possession of paraphernalia; and that the requirements of Ark. R. Crim. P. 33.1 to specifically move for a directed verdict are unconstitutional. We affirm.

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<sup>1</sup>Railey was acquitted of possession of methamphetamine with the purpose to deliver; possession of tramadol with the purpose to deliver; and maintaining a drug premises.

The parties stipulated the following at trial: (1) that 30.7 grams of methamphetamine was found inside Railey's residence in a plastic bag that was stuffed into a "Nugenix PM" bottle, (2) that Railey had a prescription for tramadol, and (3) that a bottle containing ten tramadol pills was found in the same search of the house.

A Prescott police officer testified about a controlled buy of methamphetamine at 692 Bryant Street (Railey's residence) midmorning on March 25, 2020. The police outfitted a confidential informant with a video-recording device, gave the informant cash to buy methamphetamine from Railey, and the informant returned from the buy with plastic baggies holding one hundred dollars' worth of methamphetamine. The video showed that the sale was between the informant and Railey. Railey's brother and sister also lived at that address, but the informant had bought drugs from only Railey and had always conducted the deal outside, never inside the residence. Railey, who was on parole at the time, had prior convictions for maintaining a drug premises.

Following the controlled buy, police obtained a search warrant to search the Bryant Street residence the same day and executed the search around 2:30 p.m. Railey was not present at the time of the search. The police searched the whole house, but the focus was on one room where the methamphetamine in the Nugenix bottle was found in a dresser drawer.<sup>2</sup> On the top of the dresser were torn plastic baggies, mail addressed to Railey, and a

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<sup>2</sup>Nugenix is a testosterone boosting supplement designed for men.

package addressed to Railey.<sup>3</sup> Railey's prescription tramadol bottle was also found in this room. There were no other signs of drug activity in the house except the things found in that one room.

Railey's sister knew that her brother had a prior drug conviction and that he was the only one who had ever been convicted of selling drugs from the home. Railey's sister agreed that he stayed at the home regularly and kept clothes and belongings in the room where the methamphetamine was found. That room had been their mother's before she died; after she died, it was used for storage. Railey's sister said Railey had slept in that room a few times.

Railey moved for directed verdict on the possession-of-methamphetamine charge, arguing that there was insufficient evidence to prove that he constructively possessed the drugs, given that this was a jointly occupied residence, the drugs were concealed in a bottle in a drawer, and the drugs could have been anyone's. Railey did not move for a directed verdict on the possession-of-drug-paraphernalia charge. The case was submitted to the jury, and it convicted him of the aforementioned crimes. This appeal followed.

We first respond to Railey's argument on appeal that Arkansas Rule of Criminal Procedure 33.1 is unconstitutional. Rule 33.1 requires litigants to make specific arguments to the circuit court challenging the sufficiency of the evidence to preserve any challenge to the sufficiency on appeal. Railey amplifies his argument by saying that requiring a specific

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<sup>3</sup>One piece of mail was addressed to Railey from the Office of Child Support Enforcement, and the package addressed to Railey held a shipment of male-enhancement pills.

motion for directed verdict violates a defendant's fundamental right to due process, interferes with the right to counsel and the presumption of innocence, and deprives the defendant of his right against self-incrimination. These arguments are raised for the first time on appeal and are therefore not preserved for our review. In criminal cases, issues raised, including constitutional issues, must be presented to the circuit court to preserve them for appeal. *Gooch v. State*, 2015 Ark. 227, 463 S.W.3d 296. A party cannot change the grounds for an objection or motion on appeal but is bound by the scope of arguments made at trial. *Id.* The circuit court must have the benefit of the development of the law by the parties to rule adequately on the issues, and we will not address an issue that is fully developed for the first time on appeal. *Parret v. State*, 2022 Ark. App. 234, 644 S.W.3d 472; *A.J.A. v. State*, 2019 Ark. App. 464, 588 S.W.3d 92. Moreover, Railey recognizes that our supreme court in *McClina v. State*, 354 Ark. 384, 123 S.W.3d 883, rejected a similar constitutional challenge to Rule 33.1, and we are powerless to overturn a decision of our supreme court. *Rayburn v. State*, 2018 Ark. App. 84, 542 S.W.3d 882. For the foregoing reasons, we reject Railey's constitutional argument.

We do not address Railey's arguments concerning the sufficiency of the evidence to support his conviction of possession of drug paraphernalia because he failed to move for a directed verdict on that charge. This necessarily moots Railey's argument that his acquittal on possession of the drugs with the purpose to deliver foreclosed any conviction for possession of paraphernalia. This additional argument would not be considered on appeal in any event because it, too, is raised for the first time on appeal.

This leaves us to consider the sufficiency of the evidence supporting Railey's conviction for possession of more than ten grams of methamphetamine. Railey's attorney moved for directed verdict on that charge challenging whether there was sufficient evidence to support that he was in constructive possession of the drugs found in a room of a jointly occupied residence. We hold that the State presented sufficient evidence from which the jury could find him guilty.

When reviewing a challenge to the sufficiency of the evidence arising from a motion for directed verdict, we view the evidence in the light most favorable to the State, and only the evidence supporting the verdict will be considered. *Walden v. State*, 2023 Ark. App. 177, 664 S.W.3d 443. A conviction is affirmed if substantial evidence exists to support it, meaning the evidence is forceful enough to compel a conclusion beyond suspicion or conjecture. *Allen v. State*, 2022 Ark. App. 110, 640 S.W.3d 446.

The State is not required to prove actual possession of contraband but may instead prove that the accused was in constructive possession. *Johnson v. State*, 2014 Ark. App. 567, 444 S.W.3d 880. For constructive possession, the State must establish that the defendant exercised care, control, and management over the contraband. *Id.* Constructive possession can be inferred when the contraband is found in a place immediately and exclusively accessible to the defendant and subject to his control, and constructive possession can also be inferred when the contraband is in the joint control of the accused and another. *Mudd v. State*, 2018 Ark. App. 628, 565 S.W.3d 154. However, joint occupancy alone is not sufficient to establish possession or joint possession; there must be some additional factor

linking the accused to the contraband to show that the accused exercised care, control, and management over the contraband and that the accused knew the matter possessed was contraband. *Id.* Circumstantial evidence may be sufficient evidence to support a conviction if it excludes every reasonable hypothesis other than that of the guilt of the accused. *Richard v. State*, 2021 Ark. App. 25, 615 S.W.3d 759. Whether the evidence excludes all reasonable hypotheses other than guilt is a matter for the jury to determine. *Morris v. State*, 2023 Ark. App. 228, 664 S.W.3d 473.

Viewing the evidence in the light most favorable to the State, Railey was a resident of this jointly occupied house; he had a conviction for selling drugs and was on parole; he had sold methamphetamine that day to a confidential informant; the methamphetamine in the house was found in a bottle in an opened dresser, on top of which was mail and packaging addressed to Railey; and Railey's sister admitted that Railey was the only one who had ever been convicted of selling drugs from that home, that he sometimes slept in that room, and that he used it for storage. Jurors do not and need not view each fact in isolation but rather may consider the evidence as a whole. *Bridges v. State*, 46 Ark. App. 198, 878 S.W.2d 781 (1994). Jurors are also entitled to draw any reasonable inference from circumstantial evidence to the same extent that they can from direct evidence. *Harjo v. State*, 2017 Ark. App. 337, 522 S.W.3d 839. The jury had before it sufficient evidence from which it could link Railey to the methamphetamine found in the Nugenix PM bottle.

Affirmed.

HARRISON, C.J., and BROWN, J., agree.

*Ben Motal*, for appellant.

*Tim Griffin*, Att'y Gen., by: *David L. Eanes, Jr.*, Ass't Att'y Gen., for appellee.