DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. RICARDO GONZALEZ FLORES, Appellant.	)	1 CA-CR 12-0535
	)	DEPARTMENT B
	)	**MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2006-123440-001

The Honorable John R. Ditsworth, Judge

AFFIRMED IN PART; VACATED IN PART

Thomas C. Horne, Arizona Attorney General — Phoenix
By Joseph T. Maziarz, Chief Counsel Criminal Appeals
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Attorneys for Appellee

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N O R R I S, Judge

¶1 Ricardo Gonzalez Flores appeals his convictions for possession of marijuana for sale and transportation of marijuana for sale. Ariz. Rev. Stat. ("A.R.S.") § 13-3405(A)(2), (4)

(Supp. 2012).[1] On appeal, he argues, first, the superior court should not have denied his motion for acquittal under Rule 20 of the Arizona Rules of Criminal Procedure; second, the State failed to present sufficient evidence to support his convictions; and third, the State engaged in prosecutorial misconduct during closing argument.

¶2 We disagree with Flores's arguments and affirm his conviction and sentence for transportation of marijuana for sale. We vacate his conviction and sentence for possession of marijuana for sale because, under the circumstances presented here, that offense was a lesser-included offense of transportation of marijuana for sale and, as a matter of law, he could not be convicted and sentenced for both offenses.

FACTS AND PROCEDURAL BACKGROUND[2]

¶3 On April 28, 2006, two narcotics detectives surveilled a house suspected of being a "stash house" for marijuana and saw "packaging bundles in the garage . . . which matched descriptions of packaging from previous investigations which had been known to show marijuana." At 5:15 P.M., a man,

[1]Although the Arizona Legislature amended parts of A.R.S. § 13-3405 after the date of Flores's offense, it did not amend subsection (A)(2) or (A)(4). Thus, we cite to the current version of the statute.

[2]We view the facts in the light most favorable to sustaining the jury's verdict and resolve all reasonable inferences against Flores. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

who the detectives believed owned the house, drove a black car out of the garage and parked it in front of the house. Shortly thereafter, a woman, who the detectives believed to be the driver's wife or girlfriend, came out of the house, entered the car, and drove away. At around the same time, a purple sports utility vehicle ("SUV") drove up to and entered the garage, and the garage door closed. Approximately 15 minutes later, the SUV drove out of the garage. The detectives saw that the bundles were no longer in the garage.

¶4 Subsequently, police stopped the SUV and detained its occupants, including Flores, the front-seat passenger. Police found 260 pounds of marijuana, rows of clear cellophane wrap, and a digital scale in the SUV. After a detective read Flores his *Miranda* rights, Flores admitted he knew marijuana was in the SUV, and it was illegal to possess marijuana in Arizona.

DISCUSSION[3]

I. Sufficiency of the Evidence

¶5 Flores argues the superior court should have granted his Rule 20 motion because the State did not present substantial evidence supporting his conviction. He further argues the

[3]Because we vacate the conviction and sentence for possession of marijuana for sale, we limit our discussion of the issues on appeal to only the transportation of marijuana for sale offense.

evidence did not support the jury's verdict.[4] Although Flores makes these arguments separately, we address them together because our analysis under each argument is the same. Ariz. R. Crim. P. 20(a); *State v. West*, 226 Ariz. 559, 562, ¶¶ 15–16, 250 P.3d 1188, 1191 (2011) (inquiry under Rule 20 is whether State presented "substantial evidence," that is, "such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt'") (citation omitted); *State v. Sharma*, 216 Ariz. 292, 294, ¶ 7, 165 P.3d 693, 695 (App. 2007) (review of sufficiency of the evidence is limited to whether substantial evidence supports verdicts). Based on our de novo review of the evidence, the State presented substantial evidence of his guilt. *West*, 226 Ariz. at 562, ¶ 15, 250 P.3d at 1191 (sufficiency of evidence is issue of law subject to de novo review on appeal).

¶6 At trial, the State introduced what amounted to expert testimony from the narcotics detectives who had surveilled the house and who were also experienced in drug investigations. They essentially testified about the *modus operandi* of drug trafficking and explained how the circumstances suggested Flores was knowingly involved in an ongoing marijuana trafficking

[4]To convict Flores on the transportation of marijuana for sale charge, the State was required to prove he knowingly transported marijuana for sale. A.R.S. § 13-3405(A)(4); Rev. Ariz. Jury Instr. Stand. Crim. 34.0541.

operation and not merely present in the SUV when it was stopped by police. *See generally State v. Gonzalez*, 229 Ariz. 550, 278 P.3d 328 (App. 2012) (*modus operandi* evidence regarding operation of drug trafficking organization admissible at defendant's trial for transportation of dangerous drugs for sale).

¶7 As one detective explained, the departure of the woman before the SUV's arrival signaled "something was going to happen," because drug dealers usually have family members leave the area before engaging in a drug transaction. The detective also noted the back passenger seat was "folded forward" to create more storage room so the marijuana "would not stick above the windows" and the quantity of marijuana found, 260 pounds, was an amount for sale rather than for personal use. And, of critical importance here, the detectives testified that because of the large amount of marijuana involved and the dangerous nature of the narcotics business, drug dealers would not have allowed outsiders to "tag along" for a ride, and passengers in a vehicle carrying the amount of drugs police found in the SUV would "very likely not" be "just" catching a ride, but would have to be "trustworthy," and know what is going on, be the owners of the drugs, or work for the owners.

¶8 The detectives further explained that passengers in a drug-trafficking vehicle are generally participants in the crime

to some degree: they usually facilitate the driver in counter-surveillance as "lookouts," and may possess "information of where and who they are to contact." Additionally, they explained Flores, the front-seat passenger, could "absolutely" see and smell the marijuana, which was only "[a]n elbow length" from him and had a "strong," "distinct" odor. The detectives also testified the wrapping materials and the digital scale in the SUV further indicated Flores was "en route" to meet buyers to sell the marijuana.

¶9 This evidence, when combined with Flores's statements to police he was aware of the marijuana and its illegality, constituted substantial evidence from which a reasonable jury could conclude Flores was transporting the 260 pounds of marijuana for sale. Sufficient evidence thus supported the superior court's denial of Flores's Rule 20 motion and the jury verdict.

II. Prosecutorial Misconduct

¶10 Flores argues the prosecutor violated his constitutional right to a fair trial when he improperly introduced facts not in evidence and encouraged the jury to consider his race, character, and decision not to testify at trial in deciding his guilt or innocence by, in closing rebuttal argument, asking the jury to "look at him" to determine whether he "was involved" in a drug sale.

¶11 In rebuttal closing argument, the prosecutor argued as follows:

> [Prosecutor:] Firmly convinced is all you have to be, not beyond any doubt, just beyond a reasonable doubt. Does reasonable doubt really exist in this case? What would a not guilty verdict mean? It means you think that two people carrying a large quantity of drugs picked up a hitchhiker and let him tag along to their drug sale.
>
> [Defense counsel]: Objection, Your Honor, facts not in evidence.
>
> [Prosecutor]: It also means that the defendant just happened to be in a car going to a drug sale. With that much drugs, that much money at stake, he happened to be merely present. He happened to know what was going on but wasn't involved somehow. It makes no sense, it makes zero sense that they would allow something like that to happen. You don't let someone in the fold unless they know what was going on, unless they're part of the organization, unless they're part of the deal. That is the evidence you have to consider. That is the evidence that shows this is beyond a reasonable doubt.
>
> There is no question, ladies and gentlemen, that the defendant was involved. You can look at him for yourselves and make that determination this is a guy who's along for experience and knowledge. This is not a guy along for the muscle.[5]

[5]The court did not rule on defense counsel's objection. On appeal, the State argues we should apply fundamental error review to Flores's prosecutorial misconduct argument because he did not, as he has done on appeal, argue the prosecutor's reference to his appearance violated his constitutional rights and instead raised a "facts not in evidence" objection. Although the issue might be debatable, we apply a harmless error standard because, at bottom, Flores's core argument on appeal --

¶12 We agree the prosecutor should not have commented on Flores's appearance. In *State v. Payne*, 232 Ariz. 360, 386, ¶ 131, 306 P.3d 17, 43 (2013), our supreme court recognized a prosecutor's comment on a defendant's "affect" at trial could, depending on the circumstances, have dubious relevance, implicate a defendant's right not to testify, and call the jury's attention to evidence not presented at trial. Although the court did not hold such statements are always improper, it recognized such a determination would depend on the totality of the circumstances. *Id*.

¶13 Because the circumstances presented here contain no suggestion Flores's appearance or behavior during the trial was in any way testimonial -– by gesture, display of emotion, or word -- the prosecutor's argument to the jury that it should look at Flores to decide whether he "was involved" in a drug sale was improper, as he was asking the jury to assess guilt or innocence based on facts -– Flores's appearance -– not introduced into evidence. *See generally United States v. Mendoza*, 522 F.3d 482 (5th Cir. 2008) (cited in *Payne*, 232 Ariz. at 386, ¶¶ 130-131, 306 P.3d at 43); *Bryant v. State*, 741 A.2d 495 (Md. App. 1999); *Bowser v. State*, 816 S.W.2d 518 (Tex. Ct. App. 1991); *see also Perez v. Territory*, 12 Ariz. 16, 94 P. 1097

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that the prosecutor's statement to the jury that it should look at him to decide guilt -- is grounded on facts not in evidence.

(Ariz. Terr. 1908) (prosecutor's characterization of defendants in opening statement as having crime stamped on their faces was reversible error).

¶14 Reviewing the prosecutor's argument for harmless error, we will not reverse Flores's conviction unless the comment was so prejudicial that it effectively deprived him of due process and a fair trial. *State v. Gallardo*, 225 Ariz. 560, 568, ¶¶ 34-35, 242 P.3d 159, 167 (2010). That did not happen here. The prosecutor's remark was an isolated incident, and did not "permeate[] the entire atmosphere of the trial." *Id.* at 568, ¶ 34, 242 P.3d at 167 (citation omitted). Further, the prosecutor prefaced the comment by emphasizing the trial evidence that, as he argued, demonstrated "[y]ou don't let someone in the fold unless they know what was going on, unless they're part of the organization, unless they're part of the deal."

¶15 Additionally, unlike the inflammatory remarks in the cases Flores relies on, the prosecutor did not characterize Flores's courtroom demeanor or appearance in a demeaning or abusive manner to incite the jury against him. *Cf. United States v. Schuler*, 813 F.2d 978 (9th Cir. 1987) (prosecutor implied defendant's laughter indicated lack of remorse); *United States v. Carroll*, 678 F.2d 1208 (4th Cir. 1982) (prosecutor

stated defendant's courtroom behavior showed he knew more than his lawyer because he was at the crime scene).

¶16 Finally, we do not view the prosecutor's comment as a deliberate attempt to direct the jury's attention to Flores's race, character, or his decision not to testify as he also argues on appeal. The comment was directed at the trial evidence demonstrating Flores's involvement in a drug sale, not at his race, character, or decision not to testify. *See, e.g., State v. McCutcheon*, 159 Ariz. 44, 45, 764 P.2d 1103, 1104 (1988) (to constitute constitutional error, prosecutor's comment "must be calculated to direct the jurors' attention to" defendant's failure to take the stand).

III. Possession of Marijuana for Sale Conviction

¶17 After this case was fully briefed and thus at issue, we requested supplemental briefing on whether the possession of marijuana for sale charge was incidental to the transportation of marijuana for sale charge such that the former charge was a lesser-included offense of the latter charge thus preventing Flores from being convicted of both offenses. *See generally State v. Chabolla-Hinojosa*, 192 Ariz. 360, 965 P.2d 94 (App. 1998); *see also State v. Cheramie*, 218 Ariz. 447, 189 P.3d 374 (2008) (citing *Chabolla-Hinojosa* with approval). We note Flores did not raise this issue in the superior court; thus, we review for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567,

¶ 19, 115 P.3d 601, 607 (2005); *State v. Musgrove*, 223 Ariz. 164, 167, ¶ 10, 221 P.3d 43, 46 (App. 2009) (double jeopardy violations are fundamental error).

¶18 In its supplemental brief, the State conceded error, and we agree with its concession. The possession offense was incidental to the transportation offense, and therefore a lesser-included offense, because Flores could not have transported the marijuana without necessarily possessing the marijuana. *See Chabolla-Hinojosa*, 192 Ariz. at 363, ¶ 13, 965 P.2d at 97. Therefore, "double jeopardy protects [Flores] against further prosecution" for the possession of marijuana for sale offense. *Id*. at 362-63, ¶ 10, 965 P.2d at 96-97. Thus, we vacate the possession of marijuana for sale conviction and sentence.

CONCLUSION

¶19 For the foregoing reasons, we affirm Flores's conviction and sentence for transportation of marijuana for sale and vacate his conviction and sentence for possession of marijuana for sale.

/s/
PATRICIA K. NORRIS, Judge

CONCURRING:

/s/
PETER B. SWANN, Presiding Judge

/s/
ANDREW W. GOULD, Judge