IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. MARIO ELENES, Appellant.	)	1 CA-CR 09-0536 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-005300-003 DT

The Honorable Janet E. Barton, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General By Kent E. Cattani, Chief Counsel Criminal Appeals/Capital Litigation Section Attorneys for Appellee	Phoenix
James J. Haas, Maricopa County Public Defender By Spencer D. Heffel, Deputy Public Defender Attorney for Appellant	Phoenix
Mario Elenes, *in propria persona*	Safford

K E S S L E R, Judge

¶1 Appellant Mario Elenes ("Elenes") filed an appeal from his conviction of possession of marijuana for sale, a class two

felony, pursuant to *Anders v. California,* 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969). Finding no arguable issues to raise, counsel requests that this Court search the record for fundamental error. Elenes filed a pro per supplemental brief asking this Court to review the following issues: 1) Elenes was never offered a plea agreement; 2) Elenes did not know he was going to trial; rather, he understood his interpreter to say he was getting a plea agreement for a five year probation sentence; 3) Elenes's interpreter failed to correctly interpret information. For the reasons that follow, we affirm Elenes's conviction and sentence.

FACTUAL AND PROCEDURAL HISTORY

¶2 On August 24, 2007, Drug Enforcement Administration ("DEA") agents acted on a tip from a confidential informant about the presence of marijuana in Elenes's home. Agents arrived at the home, and upon their arrival, noticed Elenes exit the home from the back RV gate. To ensure the safety of the agents, Agent S.B. ordered Elenes to the ground and handcuffed him. When agents determined the situation was safe and that no other adults were present in the home, Agent K. removed the handcuffs. Agent K. explained to Elenes in Spanish that he was not under arrest and that they "were there conducting an investigation." Agent K. then asked Elenes for permission to search his residence; Elenes consented. At that time, Elenes also signed a

DEA Consent to Search Form in the presence of Agent K.; the form was written in Spanish.

¶3 Agent B. testified that when he entered the home, he detected an overwhelming odor of marijuana. After conducting a search of the entire home, Agent B. found in the upstairs closet of the master bedroom two bales of what appeared to be marijuana along with a duffel bag containing three smaller bags filled with marijuana. Agents also found a loaded gun lying on the kitchen counter.

¶4 After agents discovered the bundles of marijuana in Elenes's home, Agent K. read Elenes his *Miranda* rights and then conducted an interview with him in Spanish. Agent K. testified that at no point in their conversation did he feel there was any miscommunication, nor did Elenes look at him "quizzically." Agent K. testified: "we conversed very openly, had good conversation. There was [sic] no problems with understanding each other." Agent H. observed this interview and testified that Elenes appeared to understand the interview questions and that he did not hesitate to answer or appear confused.

¶5 While Agent K. was interviewing Elenes, two men carrying guns, later identified as Umberto Lizarraga-Pena ("Pedro") and Roberto Castillo-Perez, arrived at the home. Agents took both men into custody. Elenes told Agent K. that Pedro was at his home earlier, but fled when he saw the agents.

Elenes related to Agent K. that Pedro believed someone was trying to steal the marijuana that he had stashed in Elenes's house two days earlier.

¶6 Agent K. testified that during their interview, Elenes admitted that he knew the packages contained marijuana, but he claimed they did not belong to him. Elenes, however, denied making this statement. Elenes testified that Pedro asked him to store a package, but he did not know what it contained. He also testified that he and his wife were unfamiliar with the odor and appearance of marijuana. DEA chemists later tested core samples of the substance seized from Elenes's home and confirmed that the substance was marijuana. Agent B. testified that approximately 70 pounds of marijuana valued at over $30,000 were found.

¶7 At trial, the State introduced into evidence the testimony of Agent B. regarding a picture found in Elenes's home depicting Jesus Malverde, a patron saint commonly connected with drug traffickers. Agent B. testified that, based on his experience, it is common for drug traffickers to make offerings to this patron saint to protect their drugs. Defense counsel did not object during this testimony; later, however, the defense moved for a mistrial, arguing that this testimony was inadmissible drug profile evidence. The court agreed that the testimony was profile evidence but declined to grant a mistrial.

Instead, the court included the following jury instruction regarding this testimony:

> You have heard testimony in this case regarding Jesus Malverde. You may consider that testimony -- testimony only as it may affect Defendant's believability as a witness. You must not consider that as -- that testimony in any way as evidence of guilt of the crime for which the defendant is now on trial.

¶8 The jury found Elenes guilty of possession of marijuana for sale, and found that an aggravating circumstance, presence of an accomplice, was proven. Elenes was sentenced to the presumptive term of five years in prison with a credit of 68 days of pre-sentence incarceration. Elenes filed a timely appeal. This court has jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-120.21(A)(1) (2003) and 13-4033(A)(1) and (3) (Supp. 2008).

ANALYSIS

I. Standard of Review

¶9 This court has reviewed the entire record for fundamental error. *State v. Barraza*, 209 Ariz. 441, 447, ¶ 19, 104 P.3d 172, 178 (App. 2005). Fundamental error is error that goes "'to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005) (citation omitted). To prevail under this

standard of review, a defendant must establish that the fundamental error caused him prejudice. *Id.* at 567, ¶ 20, 115 P.3d at 607. Prejudice depends on whether a "reasonable jury, applying the appropriate standard of proof, could have reached a different result . . . ." *Id.* at 569, ¶ 27, 115 P.3d at 609. On review, "we view the evidence in the light most favorable to sustaining the jury's verdict." *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

II. Valid Consent to Warantless Search

¶10 DEA agents conducted a warrantless search of Elenes's home after obtaining both verbal and written consent from Elenes. At no time did Elenes object to the admissibility of or move to suppress evidence obtained from this search based on the validity of his consent. Thus, we review the validity of Elenes's consent for fundamental error.

¶11 A warantless search is only valid if conducted after voluntary consent is given. *State v. Paredes*, 167 Ariz. 609, 612, 810 P.2d 607, 610 (App. 1991). "The voluntariness of a defendant's consent to search is a question of fact determined from the totality of circumstances." *Id.* "Consent must 'not be coerced, by explicit or implicit means, by implied threat or covert force.'" *State v. Guillen*, 223 Ariz. 314, 317, ¶ 11, 223 P.3d 658, 661 (2010). In *State v. Sherron*, the Court found the defendant voluntarily consented to search when he was expressly

told he was not under arrest, when he gave permission for police to look around, and when no restraints were put on his freedom which would necessitate the giving of *Miranda* warnings. 105 Ariz. 277, 279, 463 P.2d 533, 535 (1970).

¶12 In the present case, there is no evidence on the record to suggest that Elenes's consent to search his home was invalid. Agent K. expressly told Elenes that he was not under arrest, and he communicated this to Elenes in Spanish. Elenes was no longer in handcuffs when Agent K. asked permission to search his home. Elenes also signed a consent form that was written in Spanish. At trial, Elenes's counsel asked Elenes if the signature on the consent form was his; he replied, "It seems to be." The record indicates Elenes's consent to search his home was given voluntarily. Thus, we find no error.

III. Drug Profile Evidence

¶13 Agent B. testified about the significance of a picture found at Elenes's home portraying Jesus Malverde, a patron saint commonly connected to drug traffickers.

> Mr. Beaver [Counsel for the State]: Based on your training and experience, Agent B[]., is there a connection between drug trafficking and the use of a particular patron saint?
>
> Agent B[].: Yes.
>
> Mr. Beaver: And what was the name of this patron saint that, in your training and experience, drug traffickers commonly carry with them?

> Agent B[].: Jesus Malverde
>
> Mr. Beaver: Is the caricature of Jesus Malverde something that is easily recognizable to you based on your training and experience.
>
> Agent B[]: Yes.
>
> Mr. Beaver: Did you see an image of Jesus Malverde at the house?
>
> Agent B[].: Yes.

Agent B. then further clarified the connection between drug trafficking and Jesus Malverde. He stated, "And it is very common for narcotics traffickers that this individual, say Robinhood -- that they make offerings to this patron saint to protect their drugs."

¶14 Elenes's counsel failed to object to this testimony, but he later asked the court to either grant a mistrial or strike all of Agent B.'s testimony regarding Jesus Malverde on the basis that the testimony was inadmissible drug profile evidence. Initially, the court stated that it was likely to strike the testimony because it agreed that it was drug profile testimony. However, the court ultimately declined the grant of a mistrial and declined to strike Agent B.'s testimony.

¶15 The court reasoned that a mistrial was not appropriate because defense counsel failed to object to the testimony. The court also declined to strike Agent B.'s testimony, reasoning that even if the State had not been able to question Agent B.

about the photograph, the evidence would have been presented to the jury through the questioning of Mr. and Mrs. Elenes, who would have likely denied knowing the significance of Jesus Malverde. The State, then, would have been able to question Agent B. about Jesus Malverde as rebuttal testimony. Thus, the court decided to include a jury instruction requiring jurors to only consider this testimony for credibility purposes, not as substantive evidence of guilt.

¶16 "Courts commonly describe drug courier profiles as an 'informal compilation of characteristics' or an 'abstract of characteristics' typically displayed by persons trafficking in illegal drugs." *State v. Lee*, 191 Ariz. 542, 544, ¶ 10, 959 P.2d 799, 801 (1998) (citation omitted). In *Lee*, the Court held the drug courier profile testimony to be inadmissible because testimony was offered to show defendant's knowledge of the presence of drugs in his suitcase, which led to a faulty assumption that because the defendant shared characteristics with drug couriers, he must share the same criminal culpability. *Id.* at 545, ¶ 14, 959 P.2d at 802.

¶17 However, the *Lee* court noted that such profile evidence, while not admissible as substantive evidence of guilt, may be admissible in certain contexts, including the rebutting of a defense of innocence based on a profile characteristic. *Id.* (citing *United States v. Beltron-Rios*, 878 F.2d 1208, 1213 (9th

Cir. 1989)); *see also United States v. Taylor*, 716 F.2d 701, 710 (9th Cir. 1983) (holding that criminal profile testimony was admissible when defense counsel "opened the door" to a line of questioning consisting of profile evidence).

¶18 In the present case, Agent B.'s testimony regarding Jesus Malverde was not rebuttal testimony. However, this exception to the inadmissibility of profile evidence should extend to allow the evidence to discredit a defendant's statements. *See State v. Lujan*, 192 Ariz. 448, 452, ¶ 12, 967 P.2d 123, 127 (1998) ("When the facts of the case raise questions of credibility or accuracy that might not be explained by experiences common to jurors . . . expert testimony on the general behavioral characteristics . . . should be admitted.").

¶19 A case closely on point is the Eighth Circuit's decision in *United States v. Wilson*, 930 F.2d 616 (8th Cir. 1991). In *Wilson*, the government offered drug profile evidence, not as substantive evidence of guilt, but to rebut the defendant's ignorance defense and to discredit false statements he made regarding his knowledge of the contents of a package containing methamphetamines. *Id.* at 618-19. The Court held that this was a "proper use" of drug profile evidence. *Id.* Similarly, in the present case, the court instructed the jury to consider the Agent B.'s testimony, not as evidence of guilt, but as a factor which may affect the defendant's "believability as a

witness." Thus, the court did not err by allowing the jury to consider this testimony for credibility purposes.

¶20 Even if the court erred in admitting Agent B.'s testimony regarding Jesus Malverde, the error was harmless. To conclude that the error was harmless, we must find "that the error did not contribute to or affect the verdict." *State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993). In *Lee*, the court held that because there was not overwhelming evidence against the defendant, the profile testimony could have very well weighed heavily in the jury's verdict. 191 Ariz. at 546, ¶ 19, 959 P.2d at 803. *But cf. United States v. Lui*, 941 F.2d 844, 848 (9th Cir. 1991) (holding that the admission of drug profile evidence was harmless error because the evidence of the defendant's guilt, absent the drug profile evidence, was sufficient to sustain the verdict); *United States v. Echavarria-Olarte*, 904 F.2d 1391, 1398-99 (9th Cir. 1990) (holding that the admission of expert's testimony regarding methods of Colombian drug cartels was harmless error, given the overwhelming evidence of the defendant's participation in conspiracies). In the case at bar, there is sufficient evidence of the defendant's guilt, absent the testimony regarding Jesus Malverde. Thus, any error was harmless error.

IV. Issues Raised in Supplemental Brief

¶21 Elenes filed a pro per supplemental brief asking this Court to review three issues. We conclude there is no fundamental error as to any of these issues.

¶22 Elenes contends that he believed he was entering into a plea agreement of a five-year probation sentence and that he did not know he was going to trial. Elenes claims that this confusion was the result of his interpreter failing to adequately interpret his lawyer's communication. Elenes asserts that contrary to what he believed, he was never offered a plea agreement.

¶23 Even though Elenes argues that he believed he was entering into a plea agreement, the record shows that Elenes knowingly rejected the State's plea offer. The Comprehensive Pretrial Conference Statement indicates that Elenes was offered a plea agreement, but he rejected it. The statement is signed by both Elenes's attorney and the Deputy County Attorney. This statement was presented to the court during the Comprehensive Pretrial Conference on February 26, 2009. Both Elenes and an appointed interpreter were present at that conference. Furthermore, on the morning of trial, the parties provided a copy of the Joint Pretrial Statement to the judge, which indicated that a plea offer was rejected and that the defendant was not willing to further discuss settlement. Both the defendant and his interpreter were present.

¶24 However, Elenes argues that his interpreter failed to adequately interpret communication, and therefore, he did not knowingly reject the plea offer. "It is axiomatic that an indigent defendant who is unable to speak and understand the English language should be afforded the right to have the trial proceedings translated into his native language in order to participate effectively in his own defense[s] . . . ." *State v. Natividad*, 111 Ariz. 191, 194, 526 P.2d 730, 733 (1974). The Arizona Supreme Court has ruled that when the interpretation afforded to an appellant is exceptionally inadequate, he is deprived due process of law. *State v. Hansen*, 146 Ariz. 226, 232, 705 P.2d 466, 472 (App. 1985). In *Hansen*, the appellant contended that she was not provided a competent interpreter at all crucial stages of the trial proceedings, and the court agreed. 146 Ariz. at 232, 705 P.2d at 472. There, the interpreter was only provided at certain times to translate questions and interpret her answers, but the interpreter never simultaneously translated the proceedings for the appellant. *Id.*

¶25 Here, not only was Elenes granted the assistance of an interpreter for all stages of the arrest and trial, but he was also granted assistance during attorney/client conferences in preparation for the trial. The record shows that an interpreter simultaneously translated every part of the proceedings and, in fact, paused several times to clarify understanding. There is no

evidence in the record to suggest Elenes had difficulty understanding his interpreter at trial. At no point in his testimony did Elenes appear to misunderstand any questions. At one point during defense counsel's examination, Elenes seemed to be somewhat confused about the specific question being asked of him. This question concerned Elenes's statements to Agent K. regarding his knowledge of the marijuana in his home. This confusion does not appear to be a result of inadequate interpretation by the interpreter; rather, it appears to be a misunderstanding of the precise question counsel was asking. After counsel restated the question in a different way, Elenes understood and answered without hesitation.

¶26 There is no evidence in the record to suggest Elenes was surprised at any time during the trial. Elenes was given an opportunity to speak at his sentencing hearing. At that time, Elenes asked for the courts' understanding, and expressed his innocence. He also expressed remorse and requested leniency. However, at no point did he state he was unaware he was going to trial or that he believed he accepted a plea offer of five years probation. It is very clear from the record that Elenes knew that he was receiving a prison sentence, rather than a probation sentence.

¶27 Elenes claims that his interpreter failed to adequately interpret his own attorney during attorney/client conferences.

Similar to a claim of ineffective assistance of counsel, this objection seems appropriate for a motion for post-conviction relief under Rule 32 of Arizona Rules of Criminal Procedure. *See State v. Spreitz*, 202 Ariz. 1, 2, ¶ 5, 39 P.3d 525, 526 (2002) (holding an appellate court will not consider an evidentiary theory when it is advanced for the first time on appeal). Because an examination of the record does not yield any evidence to support this claim, the trial court would be the appropriate forum for such an evidentiary hearing. Elenes did not raise any objections below, nor did he file a motion for post-conviction relief.

V. The Evidence Supports the Verdict

¶28 The crime of possession of marijuana for sale requires proof that 1) the defendant knowingly possessed marijuana, and the possession was for the purpose of sale. A.R.S. § 13-3405(A)(1) and (2) (2010).

¶29 The State introduced sufficient evidence to prove Elenes knowingly possessed marijuana. First, two agents testified that the marijuana found in Elenes's home was not hidden, but clearly visible in Elenes's bedroom. The bales of marijuana were found in an open closet of the master bedroom, which was in close proximity to Elenes's bed. Second, Agent K. testified that Elenes admitted during the interview that he knew the package contained marijuana. Third, three DEA agents

testified that a strong, overwhelming scent of marijuana permeated the home. Agent K. testified that he could smell the marijuana even outside of the home. Thus, it was reasonable for the jury to infer that Elenes knowingly possessed marijuana.

¶30 Although Elenes denied telling Agent K. he knew the package contained marijuana and testified that he and his wife were not familiar with the scent of marijuana, it was reasonable for the jury to have believed the State's evidence. *See State v. Cox*, 217 Ariz. 353, 357, 174 P.3d 265, 269 (2007) (the credibility of the witnesses and the weight and value to be given to their testimony are questions exclusively for the jury).

¶31 The State presented sufficient evidence to prove the substance found in the Elenes's home was, indeed, marijuana. The DEA Laboratory Specialist testified that "core samples" taken from the packages were tested and determined to contain marijuana.

¶32 Finally, the State presented sufficient evidence to prove Elenes possessed marijuana with intent to sell. Agents seized approximately 70 lbs of marijuana valued at approximately $30,000, an amount not typical of personal use. Agents testified that the marijuana was wrapped in compressed bales, which is a common form of packaging for large quantities of marijuana for sale. Agent B. testified that personal use marijuana would be

"separated," "fluffy," not compact. Finally, the search of Elenes's home also revealed a loaded gun lying on the kitchen counter; Agent B. testified that a gun is among the common indicia of sale.

¶33 Given this evidence, it was reasonable for the jury to have concluded beyond a reasonable doubt that Elenes knowingly possessed marijuana with intent to sell.

VI. No Other Fundamental Error

¶34 We have read and considered Elenes's supplemental brief and have searched the entire record for reversible error. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. All proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. Elenes was present and was represented by counsel and accompanied by an appointed interpreter at all critical stages of the proceedings, including the verdict. The court instructed the jury with instructions consistent with the offenses charged in the indictment. The evidence was sufficient to support the verdict, and the sentence imposed was within the statutory limits. Elenes, accompanied by an appointed interpreter, was present at sentencing, was given an opportunity to address the court, and was given the proper pre-sentence incarceration credit.

¶35 After the filing of this decision, counsel's obligations pertaining to Elenes's representation in this appeal

have ended. Counsel need do no more than inform Elenes of the status of the appeal and of Elenes's future options, unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. *See State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). On the Court's own motion, Elenes has thirty days from the date of this decision to proceed, if he desires, with a motion for reconsideration or petition for review *in propria persona*.

CONCLUSION

¶ 36 For the forgoing reasons, we affirm Elenes's conviction and sentence.

_____
DONN KESSLER, Judge

CONCURRING:

_____
Philip Hall, Presiding Judge

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Patricia A. Orozco, Judge