DIVISION ONE
FILED: 04/19/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 10-1032
	)	
Appellee,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
CHARLES PROVINSAL,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-124729-001 SE

The Honorable Colleen L. French, Judge Pro Tempore

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Joseph T. Maziarz, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
by Terry J. Reid, Deputy Public Defender
Attorneys for Appellant

P O R T L E Y, Judge

¶1 Charles Provinsal appeals his convictions for possession of marijuana and possession of drug paraphernalia.

He argues that the evidence was insufficient to support his conviction for possession of drug paraphernalia and that the trial court erred by failing to suppress an involuntary statement he made to the officer. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 A police officer stopped a car after seeing it cross the center line. The officer concluded that the driver was not under the influence. He, however, arrested the front seat passenger based on an outstanding warrant. He then asked whether there was anything illegal in the car. Provinsal, who was sitting in the back, told the officer he had marijuana and a pipe and handed them to the officer. Provinsal and the remaining occupants were allowed to leave.

¶3 Provinsal was subsequently charged by information with possession of marijuana and possession of drug paraphernalia. He pled not guilty, and the matter proceeded to trial. At the final pretrial management conference, the parties stipulated to reduce the charges from class 6 felonies to class 1 misdemeanors.

¶4 The day before the original trial date, Provinsal filed a motion to suppress the evidence he gave to the officer, alleging a Fourth Amendment violation, and requested a voluntariness hearing regarding his statement to the officer.

The motion to suppress was denied as untimely. At the rescheduled trial date, the court ruled that the voluntariness issue would be considered only in the course of the bench trial.

¶5 During the bench trial, the court determined that Provinsal's statement to the officer was voluntary. Provinsal did not testify but attempted to demonstrate that the pipe and marijuana belonged to the passenger who had been arrested. The court, however, found him guilty on both counts. Sentencing occurred immediately thereafter, and Provinsal was placed on unsupervised probation for six months, fined $750, and was required to complete eight hours of substance abuse education and comply with other probation terms. We have jurisdiction over his appeal pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-1201(B) (West 2012), 13-4031 (West 2012), and -4033(A) (West 2012).

DISCUSSION

¶6 Provinsal argues that the evidence was insufficient to support his conviction for possession of drug paraphernalia. Specifically, he contends there was no evidence to prove that the pipe he handed to the officer was drug paraphernalia. We review claims of insufficient evidence de novo. *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993) (citation omitted).

¶7 We review the evidence only to determine whether substantial evidence supports the finding of guilt. *State v. Stroud*, 209 Ariz. 410, 411, ¶ 6, 103 P.3d 912, 913 (2005) (citation omitted); *see also* Ariz. R. Crim. P. 20(A) (requiring court to enter judgment of acquittal "if there is no substantial evidence to warrant a conviction"). "Substantial evidence is proof that reasonable persons could accept as sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996) (citation omitted). "We construe the evidence in the light most favorable to sustaining the verdict, and resolve all reasonable inferences against the defendant." *State v. Greene*, 192 Ariz. 431, 436-37, ¶ 12, 967 P.2d 106, 111-12 (1998) (citation omitted). To constitute reversible error, there must be "a complete absence of probative facts to support the conviction." *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (quoting *State v. Scott*, 113 Ariz. 423, 424-25, 555 P.2d 1117, 1118-19 (1976)).

¶8 "Drug Paraphernalia" is defined, in pertinent part, as "all equipment, products and materials of any kind which are used, intended for use or designed for use in . . . ingesting, inhaling or otherwise introducing into the human body a drug in

violation of this chapter." A.R.S. § 13-3415(F)(2) (West 2012).[1] A pipe "used, intended for use or designed for use" in smoking marijuana plainly falls within the definition. *See id.*

¶9 Here, the officer testified that the pipe that Provinsal handed to him was a marijuana pipe. Provinsal's girlfriend, who was in the car, testified that the pipe was a "weed pipe." Moreover, the fact that Provinsal handed the pipe to the officer with the baggy of marijuana further bolsters the conclusion that the pipe was drug paraphernalia. *See State v. West*, 226 Ariz. 559, 562, ¶ 16, 250 P.3d 1188, 1191 (2011) ("Both direct and circumstantial evidence should be considered in determining whether substantial evidence supports a conviction."). Thus, substantial evidence supports the conclusion that the pipe was used to ingest drugs, and, consequently, the conviction for possession of drug paraphernalia.

¶10 Provinsal next contends that the court erred when it did not suppress the statement he made when he handed the marijuana and pipe to the officer. He argues that because he was in custody, his statements are presumed involuntary. He also asserts that he made the statement in response to a threat or promise because the officer said that he would bring out a

[1] We cite the current version of the applicable statute because no revisions material to this decision have since occurred.

police dog to search the vehicle and that people would go to jail if anything illegal was found.

¶11 A statement to a police officer must be voluntary to be admissible. *State v. Ellison*, 213 Ariz. 116, 127, ¶ 30, 140 P.3d 899, 910 (2006) (citation omitted). We review a ruling on a motion to suppress a defendant's statement as involuntary for "clear and manifest error," which is the equivalent of an abuse of discretion. *State v. Newell*, 212 Ariz. 389, 396 & n.6, ¶ 22, 132 P.3d 833, 840 & n.6 (2006) (citation omitted). We defer to the court's factual findings, including any inferences to be drawn from the evidence and determinations of credibility, but review the ultimate legal determination de novo. *State v. Gonzalez–Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996) (citations omitted).

¶12 Although the State bears the burden of proving, by a preponderance of evidence, that a defendant's statements are voluntary, *State v. Miles*, 186 Ariz. 10, 13, 918 P.2d 1028, 1030 (1996), we reject Provinsal's argument that his statement was involuntary because he was in custody. He was not in custody when he handed the marijuana and pipe to the officer; he was simply a passenger in a vehicle that had been stopped for a traffic violation. Such an encounter is not considered custodial because: 1) traffic stops are generally much shorter than interviews in a police station, and 2) traffic stops take

place in public areas rather than in an atmosphere dominated by police presence. *Berkemer v. McCarty*, 468 U.S. 420, 437-40 (1984); *see also State v. Castellano*, 162 Ariz. 461, 462–63, 784 P.2d 287, 288–89 (App. 1989) (driver stopped for driving erratically and directed to perform field sobriety tests not in custody until he was actually placed under arrest after admitting to drinking and failing sobriety tests).

¶13 We also find that his statement was not involuntary due to coercive police conduct. A confession is involuntary if it is the product of impermissible police conduct. *State v. Amaya-Ruiz*, 166 Ariz. 152, 164, 800 P.2d 1260, 1272 (1990) (citation omitted). Pursuant to the Fifth Amendment, police may not obtain a confession by "any direct or implied promises, however slight, [or] by the exertion of any improper influence." *State v. Blakley*, 204 Ariz. 429, 436, ¶ 27, 65 P.3d 77, 84 (2003) (quoting *Malloy v. Hogan*, 378 U.S. 1, 7 (1964)). To determine if a confession is involuntary, "[a] court must look to the totality of the circumstances surrounding the confession and decide whether the will of the defendant has been overborne." *State v. Lopez*, 174 Ariz. 131, 137, 847 P.2d 1078, 1084 (1992) (citations omitted). Thus, "[t]o find a confession involuntary, we must find both coercive police behavior and a causal relation between the coercive behavior and the defendant's overborne will." *State v. Boggs*, 218 Ariz. 325,

336, ¶ 44, 185 P.3d 111, 122 (2008) (citation omitted). Though the State generally bears the burden of proof in a voluntariness determination, it is the defendant's burden to show reliance. *See State v. Tapia*, 159 Ariz. 284, 290-91, 767 P.2d 5, 11-12 (1988) (citations omitted) (defendant failed to establish that his confession was made in reliance on any direct or implied promise by detective).

¶14 Here, the trial court found there was no coercion or threats that would have overborne Provinsal's will and concluded that his statement was voluntary. The officer testified that he had told the occupants that they "should tell [him] what's inside the car because if [he] had to bring a dog out and the dog found anything, people would go to jail." As phrased, the statement can reasonably be construed as merely a "statement of fact" rather than an impermissible threat or promise. *See Miles*, 186 Ariz. at 14, 918 P.2d at 1032 (holding that a "statement of fact" is not improper coercion); *Lopez*, 174 Ariz. at 138, 847 P.2d at 1085 (same). Defense counsel questioned the officer about whether he "told [the occupants] if they were honest with you and there was contraband in the car, they could go home for the night." The officer testified that he did not recall making such a statement and later testified that he never tells people that if they cooperate they will be permitted to go home.

¶15 Provinsal did not present any evidence to dispute the officer's testimony or to show that his statement was made in reliance on a threat or promise by the officer. In fact, his girlfriend testified that the officer did not make any threats or promises to the car's occupants and that Provinsal got out of the car and "voluntarily" handed the marijuana and pipe to the officer.

¶16 Based on the totality of the evidence, we agree with the court's conclusion that the officer did not make threats or promises that overcame Provinsal's will and coerced his admission.

CONCLUSION

¶17 For the foregoing reasons, we affirm the convictions.

/s/
_____
MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/
_____
ANN A. SCOTT TIMMER, Judge

/s/
_____
ANDREW W. GOULD, Judge