NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2010-0413
	)	DEPARTMENT B
Appellee,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
JOSE FRANCISCO PERAZA,	)	the Supreme Court
	)	
Appellant.	)	

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR201000396

Honorable Ann R. Littrell, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Alan L. Amann — Tucson
Attorneys for Appellee

Law Offices of Trent R. Buckallew, P.C.
By Trent R. Buckallew — Mesa
Attorney for Appellant

K E L L Y, Judge.

¶1 Following a jury trial, appellant Jose Peraza was convicted of knowingly possessing more than four pounds of marijuana for sale. He was sentenced to a mitigated term of three years in prison. On appeal, he argues the trial court erred by failing to sua sponte order a voluntariness hearing, failing to give a requested jury instruction, precluding evidence he sought to admit, and denying his motion for a judgment of acquittal. For the reasons that follow, we affirm.

Background

¶2 We view the facts in the light most favorable to sustaining the verdict. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). Responding to a report of "suspicious activity," police officers arrived at the house where Jose Peraza lived. Officers asked to search the garage, and Peraza consented. Police found over 186 pounds of marijuana wrapped in eight bundles. Peraza later told a police officer the marijuana belonged to him. He and another man present at the house, Freddy Montiel, were charged, and Montiel pled guilty to possession of marijuana. Peraza was convicted and sentenced as described above. This appeal followed.

Discussion

Voluntariness of Statements

¶3 Peraza first asserts the trial court erred by not sua sponte holding a hearing on the voluntariness of his statements to police. Conceding that the hearing was not requested below, Peraza now asks us to review this issue for fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005) (failure to object to alleged error in trial court results in forfeiture of review for all but fundamental,

prejudicial error). Fundamental error requires the defendant to establish that: (1) an error occurred; (2) the error was fundamental; and (3) the error resulted in prejudice. *See id*.

¶4 It is a defendant's duty to properly raise issues as to the voluntariness of any inculpatory statements. *State v. Anaya*, 170 Ariz. 436, 443, 825 P.2d 961, 968 (App. 1991). A court need not hold a sua sponte voluntariness hearing unless the evidence is sufficient to alert the court that the voluntariness of statements is in question. *State v. Fassler*, 103 Ariz. 511, 513, 446 P.2d 454, 456 (1968); *State v. Goodyear*, 100 Ariz. 244, 248-49, 413 P.2d 566, 568-69 (1966); *State v. Simoneau*, 98 Ariz. 2, 6-7, 401 P.2d 404, 407-08 (1965). When that is the case, the court must consider the totality of the circumstances of the confession to determine if the defendant's will was overborne. *State v. Montes*, 136 Ariz. 491, 496, 667 P.2d 191, 196 (1983). Circumstances that courts consider include, for example, whether the defendant was intoxicated, hungry, or tired and whether the police officers involved made threats or promises to the defendant or advised him of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). *See State v. Graham*, 135 Ariz. 209, 211, 660 P.2d 460, 462 (1983).

¶5 Peraza's argument is based entirely on his claim that he was not advised of his *Miranda* rights. During trial, the police officer to whom Peraza confessed testified he had not informed Peraza of these rights. Even assuming, however, that the *Miranda* warnings were required under the circumstances and no other officers had given him these warnings, a failure to warn alone, while a valid factor in assessing voluntariness, does not, by itself, make Peraza's confession involuntary. *See Montes*, 136 Ariz. at 496, 667 P.2d at 196 (voluntariness evaluated in light of totality of circumstances). And

Peraza does not even assert that the totality of the circumstances here demonstrated that his statements were involuntary. Consequently, we find no fundamental error with the trial court's failure to sua sponte hold a voluntariness hearing.

Requested Jury Instruction

¶6 Peraza next argues the trial court erred by denying his request for a jury instruction explaining that his "mere presence" at the scene was insufficient to establish his guilt. We review for an abuse of discretion a trial court's decision not to give a requested jury instruction. *State v. Johnson*, 212 Ariz. 425, ¶ 15, 133 P.3d 735, 741 (2006). "A party is entitled to an instruction on any theory of the case reasonably supported by the evidence." *State v. Shumway*, 137 Ariz. 585, 588, 672 P.2d 929, 932 (1983).

¶7 Peraza requested a jury instruction to support his defense that he was not guilty because he had been merely present at the scene. But the evidence does not support that he was merely present. Upon the request of a police officer at the scene, Peraza consented to a search of the garage where the marijuana was found.[1] A decision on whether to consent to a search of property is an exercise of dominion and control over the property. *See United States v. Dozal*, 173 F.3d 787, 794 (10th Cir. 1999). Because Peraza exercised control over the property where the drugs were found, a mere presence

[1]Peraza also told the police officer that the garage was his. On appeal, he contests neither his claim to ownership nor his consent to search the garage.

instruction was not supported by the evidence.[2] *See Shumway*, 137 Ariz. at 588, 672 P.2d at 932. Moreover, Peraza admitted to a police officer that the marijuana belonged to him. And the jury instructions as a whole made clear that, to find Peraza guilty, the jury had to find that he knowingly possessed the marijuana, which would negate a finding of guilt based only upon his presence at the scene where the marijuana was found. *See State v. Prince*, 226 Ariz. 516, ¶ 77, 250 P.3d 1145, 1165 (2011) (court reviews instructions as a whole). The trial court did not abuse its discretion in declining to give the instruction.

Character Evidence

¶8 Peraza next contends the trial court erred by precluding evidence of his "unsophisticated" character. We review for an abuse of discretion rulings on the relevance and admissibility of evidence. *State v. Rutledge*, 205 Ariz. 7, ¶ 15, 66 P.3d 50, 53 (2003).

¶9 Relevant evidence is generally admissible. Ariz. R. Evid. 402. And evidence is relevant if it tends to make a fact of consequence more or less probable. Ariz. R. Evid. 401. While character evidence is not admissible in most cases, an exception exists for "[e]vidence of a pertinent trait of character offered by an accused." Ariz. R. Evid. 404(a)(1). Peraza attempted to offer evidence of his unsophisticated character, but the trial court sustained the state's relevance objection. He appears to contest this ruling

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[2]Peraza maintains that his request for the mere presence instruction took on greater import in light of his co-defendant's plea deal. But we disagree with his characterization that Montiel "had acknowledged responsibility for the marijuana possession." Montiel pled guilty to possession of less than two pounds of marijuana, though nearly two hundred pounds were found. Furthermore, "[p]ossession may be jointly by two or more persons[; e]xclusive possession is not required." *State v. Saiz*, 106 Ariz. 352, 355, 476 P.2d 515, 518 (1970).

solely on the basis that the evidence may have supported his defense of mere presence. But it is not clear how evidence of Peraza's lack of sophistication would have supported his defense when he exercised control over the garage by consenting to the search and admitted the drugs were his. The court reasonably could conclude this character evidence was not relevant to his knowing possession of more than four pounds of marijuana for sale. Therefore, the court did not abuse its discretion by precluding this evidence.

Motion for Judgment of Acquittal

¶10 Peraza claims the trial court erred in denying his motion for a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., arguing the state failed to produce any eye-witness testimony, fingerprints, or documentation connecting him to the marijuana in the garage. We review the trial court's ruling de novo.[3] *State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011).

¶11 A motion for judgment of acquittal should be granted only "if there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(a). And "[s]ubstantial 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). Substantial evidence "may be either

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[3]Peraza implies, and we have stated in the past, that our review of a trial court's denial of a Rule 20 motion is for an abuse of discretion. *See State v. Leyvas*, 221 Ariz. 181, ¶ 33, 211 P.3d 1165, 1175 (App. 2009); *State v. Paris-Sheldon*, 214 Ariz. 500, ¶ 32, 154 P.3d 1046, 1056 (App. 2007). But in *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993), our supreme court stated that "[w]e conduct a de novo review of the trial court's decision [on a Rule 20 motion]." *See also State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011). And "we are bound by decisions of the Arizona Supreme Court and have no authority to overrule, modify, or disregard them." *City of Phx. v. Leroy's Liquors, Inc.*, 177 Ariz. 375, 378, 868 P.2d 958, 961 (App. 1993).

circumstantial or direct." *State v. Henry*, 205 Ariz. 229, ¶ 11, 68 P.3d 455, 458 (App. 2003).

¶12 Peraza was convicted of possession of marijuana for sale. "'Possess' means knowingly to have physical possession or otherwise to exercise dominion or control over property." A.R.S. § 13-105(34). For a defendant to illegally possess drugs, he must have "either actual physical possession or constructive possession with actual knowledge of the presence of the [drugs]." *State v. Ballinger*, 19 Ariz. App. 32, 35, 504 P.2d 955, 958 (1973). Constructive possession may be established by a showing that the defendant "exercised dominion and control over the drug itself, or the location in which the [drug] was found." *State v. Teagle*, 217 Ariz. 17, ¶ 41, 170 P.3d 266, 276 (App. 2007).

¶13 As noted above, by consenting to a search of the garage, Peraza exercised dominion and control over the area where the drugs were found. *See Dozal*, 173 F.3d at 794. In addition, Peraza told a police officer that the items in the garage belonged to him and that he had "found them in the desert." Peraza's sister also testified he often worked in the garage. And, based upon his training and experience, a police officer testified the marijuana had been intended for sale because of the amount present and the way it was packaged. No further evidence was required. Accordingly, because substantial evidence of Peraza's guilt was presented at trial, the trial court did not err when it denied his Rule 20 motion.

Disposition

¶14 Peraza's conviction and sentence are affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge