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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JESUS MADRID JR., Appellant.	2 CA-CR 2011-0159 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20100559001

Honorable Jose H. Robles, Judge Pro Tempore

AFFIRMED

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E S P I N O S A, Judge.

¶1 Following a jury trial, Jesus Madrid Jr. was convicted of unlawful possession of methamphetamine and drug paraphernalia. *See* A.R.S.

§§ 13-3401(6)(b)(xvii), 13-3407(A)(1), 13-3415(A). The trial court suspended the imposition of sentence and placed him on probation for three years. Madrid appeals his convictions and the probationary term, arguing the court violated his due process rights by erroneously precluding evidence at trial. For the following reasons, we affirm.

Factual Background and Procedural History

¶2 We view the evidence in the light most favorable to sustaining the convictions. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In February 2010, police witnessed a "hand-to-hand" exchange between Madrid and another individual in the parking lot of a Tucson check-cashing facility. The officers believed the exchange involved the sale of drugs, and their observation prompted them to follow Madrid's vehicle and eventually initiate a traffic stop. Upon approaching Madrid, who was the driver of the vehicle, police detected the odor of intoxicants. Madrid stated he had consumed a beer and he provided the vehicle's registration, which indicated the car did not belong to him. The vehicle's passenger, Steven Dionne, attempted to hide an open bottle of beer under his arm and when asked to identify himself, gave a false name. The police searched the vehicle for more open containers of beer, and Madrid told them they would "find some stuff" in the car's center console. A leather pouch containing 27.6 grams of methamphetamine and an envelope bearing Madrid's address were found in the console. After arresting him, officers found he was carrying $581 in cash.

¶3 At trial, Madrid did not dispute that he had known there was methamphetamine and paraphernalia in the center console of the car, only that he had possessed them. To support mere-presence and third-party culpability defenses, he

sought to introduce evidence that Dionne had lied to police about his name. The trial court denied Madrid's motion in limine after briefing by the parties and oral argument, finding the statement was inadmissible hearsay. Madrid was convicted and sentenced as described above. This court has jurisdiction over his appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Discussion

¶4 Madrid contends the trial court erred by precluding the evidence Dionne had provided a false name, arguing it was not hearsay because it was not offered "to prove the truth of the matter asserted," that is, that Dionne's name was in fact Gabriel Perla as he had asserted. *See* Ariz. R. Evid. 801(c).[1] Madrid contends he intended to introduce the testimony only to demonstrate Dionne's consciousness of guilt. *See State v. Birchfield*, 1 Ariz. App. 436, 438, 404 P.2d 97, 99 (1965) (accused's assumption of false name admissible evidence of guilt and consciousness thereof). We review the trial court's rulings on admissibility of evidence for an abuse of discretion. *State v. Chavez*, 225 Ariz. 442, ¶ 5, 239 P.3d 761, 762 (App. 2010). An error of law may constitute an abuse of discretion. *State v. Wall*, 212 Ariz. 1, ¶ 12, 126 P.3d 148, 150 (2006).

¶5 The state acknowledges, and we agree, that the testimony was not hearsay and should not have been precluded on that basis. *See Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 157 n.6, 854 P.2d 1134, 1143 n.6 (1993) (statement not hearsay when legal significance of words is that they were said, not that words were true). But

[1]Rule 801(c) has been amended effective January 1, 2012, but the changes are stylistic only. *See* Ariz. R. Evid. 801 2012 court cmt.

the state does not address any other bases for excluding the testimony, instead agreeing with Madrid that its preclusion was error. We are not required to accept this concession, however, *see State v. Sanchez*, 174 Ariz. 44, 45, 846 P.2d 857, 858 (App. 1993), and, because we will uphold the trial court's ruling if legally correct for any reason, *State v. Cañez*, 202 Ariz. 133, ¶ 51, 42 P.3d 564, 582 (2002), we undertake an independent analysis of the admissibility of the statement.

¶6 Our supreme court has directed trial courts to assess admissibility of third-party culpability evidence under Rules 401, 402, and 403, Ariz. R. Evid. *State v. Machado*, 226 Ariz. 281, ¶ 16, 246 P.3d 632, 635 (2011) (*Machado II*). To be admissible under Rule 402, non-hearsay evidence must be relevant pursuant to Rule 401, and its probative value must not be substantially outweighed by the risk that it will cause unfair prejudice, confusion of the issues, or delay, under Rule 403.

¶7 Evidence is relevant if it tends to make the existence of any fact that is of consequence to the determination of the action more probable or less probable. *State v. Gibson*, 202 Ariz. 321, ¶ 13, 44 P.3d 1001, 1003 (2002). Third-party culpability evidence is relevant if it "tend[s] to create a reasonable doubt as to the defendant's guilt," *id.* ¶ 16 (emphasis omitted), and evidence demonstrating a third party's guilt is usually relevant evidence, *State v. Machado*, 224 Ariz. 343, ¶ 49, 230 P.3d 1158, 1175 (App. 2010) (*Machado I*), *aff'd*, 226 Ariz. 281, 246 P.3d 632. That being said, "'[a] defendant may not, in the guise of a third-party culpability defense, simply throw strands of speculation on the wall and see if any of them will stick.'" *State v. Alvarez*, 228 Ariz. 579, ¶ 4, 269 P.3d 1203, 1205 (App. 2012), *quoting Machado II*, 226 Ariz. 281, n.2, 246

P.3d at 635 n.2. In this case, the only element of the crime at issue was whether Madrid had possessed the drug and paraphernalia by "knowingly . . . exercis[ing] dominion or control over" them. A.R.S. § 13-105(34).

¶8 The state suggests that to be admissible, the third-party culpability evidence must link Dionne to the methamphetamine, but that standard was rejected by our supreme court in *Gibson* in favor of an inquiry that focuses on the impact of the evidence on the defendant's culpability. 202 Ariz. 321, ¶¶ 15-16, 44 P.3d at 1003-04. Madrid argues that because Dionne lied about his identity while sitting next to the drug, it was evidence of his guilty knowledge that the drug and paraphernalia belonged to him. Madrid suggests the circumstances of this case are similar to the situation in *Machado*, where the only issue was whether the defendant or someone else had committed a murder and certain evidence tended to show another person may have been the perpetrator. *Machado II*, 226 Ariz. 281, ¶¶ 7, 25, 246 P.3d at 634, 636-37.

¶9 But, unlike the evidence of third-party guilt in *Machado*, Dionne's guilt would not have precluded finding Madrid guilty of the offenses. The fact Dionne might have participated in the crime does not necessarily exculpate Madrid because "possession . . . can consist of constructive possession[,] . . . found by showing the accused's dominion and control of the drug[,] . . . and two or more persons may have joint possession thereof." *State v. Miramon*, 27 Ariz. App. 451, 452, 555 P.2d 1139, 1140 (1976). Additionally, the jury was instructed it could find Madrid had possessed the methamphetamine if he actually or constructively possessed the drug "either acting alone or with another person." Thus, that Dionne had lied to police about his identity was not

relevant to the only issue, which was whether Madrid had possessed the drug and the paraphernalia.

¶10 Neither is Dionne's statement relevant to support Madrid's theory that he had been merely present in the car. *See Miramon*, 27 Ariz. App. at 452, 555 P.2d at 1140 ("[M]ere presence of a person where [drugs are] found is insufficient to establish that the person knowingly possessed or exercised dominion and control over the drugs."). Madrid concedes on appeal he directed police to the location of the methamphetamine but argues he did not claim it was his, it more likely belonged to the passenger who had given a false name, and Madrid was merely in the wrong place at the wrong time. While evidence that Madrid did not possess the drug would be relevant to support his mere-presence defense, he cites no authority for the proposition that evidence of Dionne's guilt would tend to demonstrate Madrid did not control the contraband, jointly or otherwise. Thus, the proffered evidence was not relevant to any fact of consequence and could properly be precluded under Rules 401 and 402.

¶11 Moreover, the probative value of the evidence did not outweigh the danger of unfair prejudice or confusion. Ariz. R. Evid. 403. While Madrid claims Dionne's false statement was highly probative of culpability, citing *Machado II*, 226 Ariz. 281, ¶¶ 16, 25, 246 P.3d at 635-37, as noted above, the statement would have been probative only if, in context, it tended to show Dionne had committed the crime and Madrid was innocent. *See Machado I*, 224 Ariz. 343, ¶¶ 39, 45, 47, 51, 230 P.3d at 1173-76. But any such implication would be purely speculative, and could have confused the jury with irrelevant issues regarding Dionne's culpability. *See State v. Dann*, 205 Ariz. 557, ¶ 36,

74 P.3d 231, 243 (2003) (tenuous and speculative third-party culpability evidence fails Rule 403). Accordingly, the evidence would have been properly excluded under Rule 403.

¶12 Madrid lastly argues the trial court's ruling deprived him of his constitutional right to present a complete defense, citing *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (exclusion of competent, reliable, and relevant exculpatory evidence central to defense deprives defendant of fair trial in absence of valid state justification). But because we find no error in the court's exclusion of Dionne's irrelevant statement, Madrid could not have been harmed thereby. *State v. Abdi*, 226 Ariz. 361, ¶ 32, 248 P.3d 209, 216 (App. 2011) ("Although the right to present a defense is a fundamental constitutional right, it is subject to evidentiary rules.").

Disposition

¶13 Madrid's convictions and sentences are affirmed.

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

CONCURRING:

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

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