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JUN 28 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. STANLEY JON LEE, Appellant.	2 CA-CR 2011-0225 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20080565

Honorable Jane L. Eikleberry, Judge

AFFIRMED

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and Alan L. Amann
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V Á S Q U E Z, Presiding Judge.

¶1 After a jury trial, Stanley Lee was convicted of possession of marijuana for sale having a weight of four pounds or more and was sentenced to a presumptive, five-year prison term. On appeal, Lee argues the trial court erred in admitting "drug courier profile" evidence, and he challenges the sufficiency of the evidence supporting his conviction. For the reasons stated below, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdict and resolve all reasonable inferences against Lee. *State v. Fiihr*, 221 Ariz. 135, ¶ 3, 211 P.3d 13, 14 (App. 2008). On January 25, 2008, United States Border Patrol Agent Laura Cabranes received a radio report that "some individuals had been seen loading up bundles into a white pickup truck with an extended cab" and it was traveling northbound on Sasabe Road in an area that was "pretty busy" for "illegal [drug] operations." As Cabranes drove southbound on Sasabe Road, she observed a vehicle matching the truck's description. She turned around and followed the truck for several miles, and at one point pulled alongside and observed a female driver and a male passenger, neither of whom made eye contact with her. Cabranes ran a check of the license plate and discovered the truck was registered to a rental company.

¶3 When Cabranes drove behind the truck and activated her emergency lights and sirens, the driver immediately pulled to the side of the road. Cabranes approached the driver-side window and smelled an odor of marijuana. The driver was placed under arrest and handcuffed. Cabranes also observed several "[b]undles of what appeared to be

marijuana" in plain view inside the cab of the truck. Most of the bundles were located in the rear-seating area, but the passenger, Lee, had his feet resting on one bundle that was on the front floorboard. Cabranes asked Lee to step out of the vehicle and placed him under arrest. It later was determined that the bundles of marijuana weighed a total of 206 pounds.

¶4 Lee was charged with transportation of marijuana for sale having a weight of more than two pounds.[1] At trial, the jury also was instructed on the lesser-included offenses of possession of marijuana for sale and unlawful possession of marijuana. The jury found Lee guilty of possession of marijuana for sale having a weight of more than four pounds, and he was sentenced as described above. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Discussion

Expert Testimony

¶5 Lee argues the trial court erred by allowing the state to elicit expert testimony about the patterns and practices of drug traffickers in southern Arizona. Relying on *State v. Lee*, 191 Ariz. 542, 959 P.2d 799 (1998), he maintains the testimony was "nothing more than a 'marijuana trafficker profile,'" and, as such, "it ha[d] no evidentiary value, and should not have been presented to the jury." Lee acknowledges he did not object to the testimony at trial and therefore has forfeited the right to seek relief

[1]The driver of the truck was charged under the same cause number with the same offense. She pled guilty to attempted transportation of marijuana for sale, and the trial court sentenced her to a mitigated, 1.5-year term of imprisonment.

for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). Fundamental error is that "'going 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. Alvarez*, 213 Ariz. 467, ¶ 7, 143 P.3d 668, 670 (App. 2006), *quoting Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. "To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607.

¶6 In *Lee*, our supreme court "condemned the use of drug courier profile evidence as substantive proof of guilt." 191 Ariz. 542, ¶ 12, 959 P.2d at 802. The court described such evidence as "a loose assortment of general, often contradictory, characteristics and behaviors used by police officers to explain their reasons for stopping and questioning persons about possible illegal drug activity." *Id.* ¶ 10. The danger with profile evidence and, thus, the reason for its prohibition, is that it "'creates too high a risk that a defendant will be convicted not for what he did but for what others are doing.'" *Id.* ¶ 12, *quoting State v. Cifuentes*, 171 Ariz. 257, 257, 830 P.2d 469, 469 (App. 1991). But *Lee* also recognized four exceptions to the general prohibition, including: to provide background for a police stop and search, *see United States v. Gomez-Norena*, 908 F.2d 497, 501 (9th Cir. 1990); to lay foundation for expert opinion, *see United States v. Webb*, 115 F.3d 711, 715 (9th Cir. 1997), *overruled on other grounds by United States v. Hankey*, 203 F.3d 1160, 1169 n.7 (9th Cir. 2000); as rebuttal evidence, *see United States*

v. Beltran-Rios, 878 F.2d 1208, 1213 (9th Cir. 1989); and to explain a method of operation, *United States v. Cordoba*, 104 F.3d 225, 230 (9th Cir. 1997).

¶7 Here, Lee challenges the testimony of Javier Garayzar, a sergeant with the Arizona Department of Public Safety and a member of the Tucson Metropolitan Counter Narcotics Alliance. Garayzar described his extensive training and experience in drug-related cases and testified he was familiar with "marijuana trafficking methods." He explained in detail the ways in which marijuana is packaged, stored, and brought into the United States, noting that it is often transported using rental vehicles. He gave estimates as to the street value of marijuana and testified that in order to protect a drug operation, "outsiders" are not permitted to participate in the transportation of marijuana. He also testified the quantity of marijuana confiscated in this case, 206 pounds, is an amount possessed for sale rather than for personal use. Lee argues this testimony "should have been precluded because it was not relevant to prove possession, its admission invaded the province of the jury as finder of fact, and its impact was unfairly prejudicial."

¶8 Rule 702, Ariz. R. Evid., provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's . . . specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and

> (d) the expert has reliably applied the principles and methods to the facts of the case.

But even if expert testimony meets the requirements of Rule 702, under Rule 403, Ariz. R. Evid., it may be excluded "if its probative value is substantially outweighed by a danger of . . . unfair prejudice." "Not all harmful evidence, however, is unfairly prejudicial." *State v. Mott*, 187 Ariz. 536, 545-46, 931 P.2d 1046, 1055-56 (1997). "Evidence is unfairly prejudicial only if it has an undue tendency to suggest a decision on an improper basis, such as emotion, sympathy, or horror." *State v. Gulbrandson*, 184 Ariz. 46, 61, 906 P.2d 579, 594 (1995).

¶9 Here, the bulk of Garayzar's testimony focused on explaining the methods involved in drug-smuggling operations, and it was therefore relevant and potentially helpful to the jury. Moreover, contrary to Lee's argument, "testimony that drug traffickers do not entrust large quantities of drugs to unknowing transporters is not drug courier profile testimony." *Cordoba*, 104 F.3d at 230; *see also State v. Gonzalez*, No. 1 CA-CR 11-0494, ¶ 13, 2012 WL 2107957 (Ariz. Ct. App. June 12, 2012). But even assuming that part of Garayzar's testimony constituted profile evidence, it was properly admitted to rebut Lee's mere presence defense. Indeed, the transcripts show that the state did not elicit statements from Garayzar linking his method-of-operation testimony directly to the facts of this case until redirect examination, after Lee had opened the door to such

inquiry on cross-examination.[2] *See Beltran-Rios*, 878 F.2d at 1212-13 (profile testimony may be proper rebuttal when defense opens door to line of inquiry).

¶10 The trial court was in the best position to weigh the probative value of the evidence against any danger of unfair prejudice in its admission. *See State v. Fernane*, 185 Ariz. 222, 226, 914 P.2d 1314, 1318 (App. 1995). And, normally, "the probative force and prejudicial effect of evidence [are] viewed favorably toward the proponent of the evidence." *Id.* Here, we cannot say the court struck an inappropriate balance between these competing interests. Thus, we find no error, let alone fundamental error, in the admission of the testimony.

Sufficiency of Evidence

¶11 At the close of the state's case, Lee moved for a judgment of acquittal, pursuant to Rule 20, Ariz. R. Crim. P., essentially arguing the state presented no evidence of his participation in the crime. The trial court denied the motion, finding "substantial evidence from which a reasonable trier of fact could convict" Lee. *See* Ariz. R. Crim. P. 20(a) (court must grant judgment of acquittal when "there is no substantial evidence to

[2]During direct examination, the state focused its questioning exclusively on the practices of drug traffickers generally; it did not attempt to elicit an opinion from Garayzar with respect to this case. On cross-examination, however, Lee's counsel asked the following question: "My client, of course, was a passenger, not the driver of the vehicle, merely a passenger. It's possible, isn't it, that a passenger would not know anything about the operation? Isn't that possible?" Garayzar responded that although that was possible, it was not probable. On redirect examination, the state then asked: "[B]ased on this line of questioning, if I put you in a situation where there was a mere passenger, . . . sitting with his feet on a bale of marijuana that size, does that fit, based on your training and experience, someone who is merely present? Or are they involved?" Though he did not directly answer the question asked, Garayzar responded that someone "can't have [his or her] feet on it and not know what [it] is."

warrant a conviction"). On appeal, Lee contends the court erred in denying the motion because the state failed to present substantial evidence from which a jury could find he had actual physical or constructive possession of the marijuana. We disagree.

¶12 "Th[e] question of sufficiency of the evidence is one of law, subject to de novo review on appeal." *State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011). We evaluate the sufficiency of the evidence presented at trial to determine only whether substantial evidence supports the jury's verdict. *State v. Roque*, 213 Ariz. 193, ¶ 93, 141 P.3d 368, 393 (2006). Substantial evidence is evidence that "reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt." *State v. Hughes*, 189 Ariz. 62, 73, 938 P.2d 457, 468 (1997). In reviewing the sufficiency of the evidence, we must consider the "statutorily required elements of the offense." *State v. Pena*, 209 Ariz. 503, ¶ 8, 104 P.3d 873, 875 (App. 2005).

¶13 To obtain a conviction under A.R.S. § 13-3405(A)(2), the state needed to prove Lee knowingly possessed marijuana for sale. "Possess" is defined as to "knowingly . . . have physical possession or otherwise to exercise dominion or control over property." A.R.S. § 13-105(34). That same statute describes "possession" as "a voluntary act if the defendant knowingly exercised dominion or control over property." § 13-105(35). Possession "may be sole or joint." *State v. Miramon*, 27 Ariz. App. 451, 452, 555 P.2d 1139, 1140 (1976). The terms "dominion" and "control" carry their ordinary meaning, such that dominion means "'absolute ownership'" and control means

to "'have power over.'" *State v. Tyler*, 149 Ariz. 312, 316, 718 P.2d 214, 218 (App. 1986), *quoting Webster's Third New International Dictionary* 496, 672 (1981).

¶14 Dominion or control in the absence of actual physical possession has been characterized as constructive possession. *See State v. Villavicencio*, 108 Ariz. 518, 520, 502 P.2d 1337, 1339 (1972). Constructive possession exists when the prohibited property "is found in a place under [the defendant's] dominion [or] control and under circumstances from which it can be reasonably inferred that the defendant had actual knowledge of the existence of the [property]." *Id.* Constructive possession may be proven by direct or circumstantial evidence, *see State v. Villalobos Alvarez*, 155 Ariz. 244, 245, 745 P.2d 991, 992 (App. 1987), but a person's mere presence at a location where contraband is found is insufficient to show the person knowingly exercised dominion or control over it, *Miramon*, 27 Ariz. App. at 452, 555 P.2d at 1140.

¶15 Relying on *Miramon*, Lee argues that he was merely present in the truck where the marijuana was found. In *Miramon*, the defendant was charged with possession of marijuana for sale after police officers found a bag of marijuana under the passenger seat in which he was sitting. 27 Ariz. App. at 452, 555 P.2d at 1140. The court recognized the defendant must have known of the marijuana's existence because the bag protruded enough to touch his feet or pants. *Id.* at 452-53, 555 P.2d at 1140-41. However, the court found insufficient evidence existed to convict the defendant because "the state did not prove that he had the right to control its disposition or use." *Id.* at 453, 555 P.2d at 1141. According to Lee, mere presence is a "broad defense," and his

knowledge of the marijuana, *see State v. Curtis*, 114 Ariz. 527, 528, 562 P.2d 407, 408 (App. 1977), and the fact that he physically touched it, *see United States v. Vasquez-Chan*, 978 F.2d 546, 551-52 (9th Cir. 1992), *overruled on other grounds by United States v. Nevils*, 598 F.3d 1158, 1167 (9th Cir. 2010), are insufficient to prove he possessed it.

¶16 Although we agree with Lee that, standing alone, merely being present where marijuana is found is insufficient evidence of possession, we disagree that the state failed to present other evidence to support his conviction. The jury heard evidence that a white, extended-cab pickup truck was being loaded by "some individuals" with bundles near the U.S.-Mexico border and was headed northbound on Sasabe Road. Agent Cabranes testified that she located a truck matching that description with two occupants traveling in an area known for frequent illegal drug activity and containing 206 pounds of marijuana. She identified Lee as the passenger and testified that he had his feet resting on one of the bundles. In short, the jury reasonably could infer that Lee was involved in the operation and not merely present, given the report of "some individuals" loading a truck that matched the one in which Lee was riding as a passenger and that was later found to contain 206 pounds of marijuana. The state also introduced evidence that in drug-smuggling operations, "outsiders" are not involved in the transportation of the drugs because there is a fear that they will talk and their presence will raise "red flags" for potential buyers.

¶17 To support his mere presence defense at trial, Lee maintained that the driver of the truck possessed the marijuana.[3] As the state points out, the trial court instructed the jury on mere presence, explaining "the fact that the defendant may have been present, or knew that a crime was being committed, does not in and of itself make the defendant guilty of the crime charged." The jury, as the trier of fact, resolves conflicts in the evidence and assesses the credibility of witnesses. *State v. Williams*, 209 Ariz. 228, ¶ 6, 99 P.3d 43, 46 (App. 2004). On appeal, we will not reweigh the evidence to determine whether we would have convicted Lee; instead, we only look for substantial evidence to support the jury's verdict. *See State v. Jones*, 188 Ariz. 388, 394, 937 P.2d 310, 316 (1997). We conclude the state presented substantial evidence—both direct and circumstantial—from which the jury could find that Lee had possession of the marijuana.

Disposition

¶18 For the reasons stated above, Lee's conviction and sentence are affirmed.

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

CONCURRING:

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

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

[3]Despite his mere presence defense, Lee apparently offered no innocent explanation for being in the truck.