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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OF ARIZONA, Appellee, v. MARTIN FRANCISCO VALENZUELA, Appellant.	2 CA-CR 2011-0339 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20101592001

Honorable Scott Rash, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani, Joseph T. Maziarz, and
Joseph L. Parkhurst
Tucson
Attorneys for Appellee

Cooper & Udall, P.C.
By Laura E. Udall
Tucson
Attorneys for Appellant

E S P I N O S A, Judge.

¶1 After a jury trial, Martin Valenzuela was convicted of possession of marijuana for sale. He argues on appeal that the trial court erred in denying his motions

for a judgment of acquittal and a new trial on grounds the evidence was insufficient to support his conviction and the jury's verdict was against the weight of the evidence. He alternatively argues the court erroneously denied his motion for a new trial based on an allegedly improper closing argument by the prosecution. We affirm.

Factual Background and Procedural History

¶2 "On appeal, we view the facts in the light most favorable to upholding the verdict and resolve all inferences against the defendant." *State v. Klokic*, 219 Ariz. 241, n.1, 196 P.3d 844, 845 n.1 (App. 2008). In April 2010, members of the Counter Narcotics Alliance, a drug interdiction task force comprised of various law enforcement agencies, undertook surveillance of a house in Tucson. Shortly thereafter, a man later identified as Valenzuela arrived in a car and parked on a side street. While speaking on a cellular telephone, he walked across the yard toward the front door of the house, which "opened just prior to him getting there," and went inside.

¶3 About ten minutes later, the house's garage door opened and a large sport utility vehicle (SUV) backed out onto the street and drove away. Part of the surveillance team followed the vehicle and conducted a traffic stop. Although a drug-detection dog alerted to the passenger's side door and then to the rear cargo area of the SUV, no drugs were found in these locations; ultimately, only a small "sample" bag of marijuana was found in the driver's side door pocket. After the traffic stop, the SUV was returned to the house, where the supervising officer was preparing to make contact with the house's occupants. While two uniformed officers approached the front door, Valenzuela and another man were seen running from the back of the house. Officers ordered the two

men to stop; Valenzuela complied, and the other suspect was chased down and ultimately apprehended.

¶4 After obtaining a warrant, officers searched the house and found nearly a thousand pounds of marijuana in various rooms, as well as packaging materials, inventory ledgers, digital scales, a pistol and ammunition, and a road map with routes marked from Mexico to San Antonio and Tucson. Valenzuela and the other two suspects were charged with possession of marijuana for sale and possession of drug paraphernalia. At Valenzuela's trial, the court granted his motion for a judgment of acquittal as to the paraphernalia charge but denied acquittal on the marijuana charge. The jury found him guilty of possession of marijuana for sale and determined the quantity of marijuana was four pounds or more. The court denied his post-verdict motions for a judgment of acquittal and a new trial, and sentenced him to a mitigated term of three years' imprisonment. We have jurisdiction over his appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Discussion

Sufficiency of Evidence

¶5 Valenzuela argues there was insufficient evidence to support his conviction of possession of marijuana for sale and therefore the trial court erred in denying his motion for a judgment of acquittal made pursuant to Rule 20, Ariz. R. Crim. P. We review the denial of a Rule 20 motion *de novo*. *State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011). In evaluating a Rule 20 ruling, "'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any*

rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Id.* ¶ 16, *quoting State v. Mathers*, 165 Ariz. 64, 66, 796 P.2d 866, 868 (1990). "'Substantial evidence,' Rule 20's lynchpin phrase, 'is such proof that reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *Id.*, *quoting Mathers*, 165 Ariz. at 67, 796 P.2d at 869. "Both direct and circumstantial evidence should be considered in determining whether substantial evidence supports a conviction." *Id.* Denying a Rule 20 motion is proper "where reasonable minds could differ on the inferences to be drawn from the evidence presented." *State v. Belyeu*, 164 Ariz. 586, 590, 795 P.2d 229, 233 (App. 1990).

¶6 To sustain Valenzuela's conviction for possession of marijuana for sale, the state was required to present substantial evidence he had knowledge of the drug's presence, it was in fact marijuana, he possessed it, and the possession was for the purpose of sale. *See* A.R.S. § 13-3405(A)(2); *State v. Murphy*, 117 Ariz. 57, 61, 570 P.2d 1070, 1074 (1977); *State v. Arce*, 107 Ariz. 156, 160, 483 P.2d 1395, 1399 (1971). Valenzuela does not dispute that the evidence was sufficient to prove the house contained marijuana, that he knew it was present, or that it was held for sale. He maintains instead that he had been merely present and the state's evidence was insufficient to show he had possessed the marijuana.

¶7 Our legislature has defined "possess" to mean "knowingly to have physical possession or otherwise to exercise dominion or control over property." A.R.S. § 13-105(34). A person may be convicted of possession of marijuana if the state proves

he or she exercised dominion or control over the drug or the place where it is found, whether or not he or she had physical possession. *Murphy*, 117 Ariz. at 61, 570 P.2d at 1074; *State v. Riley*, 12 Ariz. App. 336, 337, 470 P.2d 484, 485 (1970). However, mere knowledge of the drug's presence, without more, is insufficient to establish possession. *State v. Miramon*, 27 Ariz. App. 451, 452, 555 P.2d 1139, 1140 (App. 1976).

¶8 The state argues the evidence was sufficient to show that Valenzuela had exercised dominion and control over the marijuana found in the house. *See Riley*, 12 Ariz. App. at 337, 470 P.2d at 485 (person with dominion or control over property has constructive possession). To establish that Valenzuela had dominion or control, the state was required to prove he "had the right to control [the drug's] disposition or use." *Miramon*, 27 Ariz. App. at 453, 555 P.2d at 1141. But the evidence need not have shown Valenzuela "exercised exclusive possession or control over the substance itself or the place in which [it] was found; control or right to control is sufficient." *State v. Curtis*, 114 Ariz. 527, 528, 562 P.2d 407, 408 (App. 1977); *see also Miramon*, 27 Ariz. App. at 452, 555 P.2d at 1140 ("Possession of narcotics may be sole or joint and two or more persons may have joint possession thereof.").

¶9 Although it is a close question, we conclude the state's evidence, considered in the aggregate, was sufficient to allow a reasonable jury to infer that Valenzuela had possessed the marijuana found inside the house. First, there was testimony that the house lacked normal indicators of occupancy as a residence, such as towels, toiletries, and clothing, from which the jury could reasonably have concluded it was used exclusively for the processing of marijuana, a conclusion Valenzuela does not

dispute. And the jury reasonably could have found that Valenzuela was expected at the house based on the testimony that the front door opened for him from the inside without his having to knock. It also could find he was aware the marijuana was being processed in the house based on evidence that the entire premises smelled strongly of raw marijuana and there were numerous bales stacked overtly in the kitchen, which was open to other areas of the house.

¶10 In addition, the jury could infer that Valenzuela's arrival only a few minutes before the departure of the SUV whose cargo area, though empty, smelled strongly of marijuana, suggested his arrival was timed to help process a shipment that recently had been delivered. And the jury could have concluded, based on the piles of discarded packaging materials and garbage bags containing loose marijuana debris, that the recently transported marijuana was being repackaged for distribution while Valenzuela was inside the house but that the process was interrupted when law enforcement approached the front door. Finally, the jury heard evidence that Valenzuela had attempted to flee the premises just before police made contact, a fact to which it could properly have attributed consciousness of guilt. *See State v. Edwards*, 136 Ariz. 177, 184, 665 P.2d 59, 66 (1983) (flight by accused raises inference of guilt).

¶11 Although these facts may also be susceptible of a noncriminal explanation, "an appellate court does not reweigh the evidence to decide if it would reach the same conclusions as the trier of fact." *State v. Barger*, 167 Ariz. 563, 568, 810 P.2d 191, 196 (App. 1990). Viewing the evidence in the light most favorable to upholding the verdict, we conclude reasonable persons could accept it as sufficient to support a conclusion

beyond a reasonable doubt that Valenzuela had constructively possessed the marijuana for sale. *See West*, 226 Ariz. 559, ¶ 16, 250 P.3d at 1191. Because "'reasonable minds [could] differ on inferences drawn from the facts,'" the trial court properly permitted the case to go to the jury and did not err in denying Valenzuela's motion for a judgment of acquittal. *Id.* ¶ 18, *quoting State v. Lee*, 189 Ariz. 590, 603, 944 P.2d 1204, 1217 (1997).

¶12 Valenzuela relies on *Curtis*, 114 Ariz. at 529-30, 562 P.2d at 409-10, for his argument that "a defendant's mere presence at a house where a narcotic drug is in plain view and his close proximity to it are insufficient to establish possession of that drug." In *Curtis*, this court reversed the defendant's conviction for possession of marijuana, finding insufficient evidence of physical possession or dominion or control when police entered a home and discovered three people, including the defendant, sitting on a couch a short distance from a sandwich bag of marijuana and a partially burned and still warm marijuana cigarette. *Id.* at 528, 530, 562 P.2d at 408, 410. The *Curtis* court determined that the state had failed to establish a link between the defendant and the marijuana, even though the drug was in plain view on a table only two feet from where the defendant was sitting. *Id.* at 528, 530, 562 P.2d at 408, 410.

¶13 But *Curtis* is factually distinguishable from the case before us. In *Curtis*, there was evidence that the house was a "home" inhabited by "residents" and that the defendant was present to paint a portrait of one of those residents. *Id.* at 528, 562 P.2d at 408. The house in this case, on the other hand, was used solely to store and process marijuana for sale. A person may be present at another's personal residence for a variety of reasons, and if residents or other guests engage in illegal activity there the person's

presence does not necessarily warrant an inference that he or she was involved. *See id.* Indeed, in *Curtis*, as noted above, there was testimony that the defendant was there to paint a portrait of one of the residents, and a partially completed painting taken from the house was introduced into evidence at trial. *Id.* But when a person has ready access to a place used exclusively to conduct an illegal enterprise, his presence there is far more suggestive of involvement in the enterprise and less susceptible of alternative inferences. Thus, Valenzuela's ability to immediately enter the house used exclusively for processing marijuana and his arrival ten minutes before the departure of the SUV that smelled strongly of marijuana but contained only a small amount of the drug, when considered together, support the inference that he was not merely present but rather was part of the operation and shared in the handling and control of the marijuana. *See Miramon*, 27 Ariz. App. at 453, 555 P.2d at 1141 (right to control may be established by circumstantial evidence); *see also State v. McLoughlin*, 133 Ariz. 458, 461 n.2, 652 P.2d 531, 534 n.2 (1982) (jurors may rely on common sense and experience in deliberations). Indeed, the state introduced expert testimony from an officer experienced in marijuana trafficking investigations that the circumstances suggested an ongoing processing and distribution operation at the time Valenzuela was inside the house.

¶14 We also find distinguishable the other cases on which Valenzuela relies. In *Carroll v. State*, 90 Ariz. 411, 414, 368 P.2d 649, 650-51 (1962), for example, our supreme court reversed the defendant's conviction because a small quantity of a drug was found in a public place near where the defendant had been seated, but there was only "frail" evidence that the defendant had known of the drug's presence. Here, by contrast,

there was abundant circumstantial evidence that Valenzuela had known of the marijuana's presence given the multiple bales stacked in plain view and the pervasive odor in the house. Similarly, in *Miramon*, 27 Ariz. App. at 453, 555 P.2d at 1141, this court reversed the defendant's conviction because the state had failed to prove by even circumstantial evidence that he had had the right to control the disposition or use of the marijuana. In the case before us, however, there was substantial circumstantial evidence that Valenzuela was able to exercise joint control of the marijuana, as discussed above.[1]

¶15 Additionally, the jury was instructed on accomplice liability and the evidence was sufficient to support Valenzuela's conviction as an accomplice. "A person is criminally accountable as an accomplice if, 'with the intent to promote or facilitate the commission of an offense,' the person solicits, aids, or '[p]rovides means or opportunity

[1]Valenzuela also cites various federal cases in support of his argument. *See United States v. Rodriguez*, 761 F.2d 1339, 1341 (9th Cir. 1985) (conviction reversed when no evidence connected defendant to counterfeit currency found in hotel room where he was arrested with codefendant); *United States v. Ard*, 731 F.2d 718, 721, 724 (11th Cir. 1984) (evidence sufficient to convict defendant of conspiracy to possess marijuana with intent to distribute and possession of marijuana with intent to distribute "[i]n light of the size of th[e] operation, the precautions that were taken, and the pervasive odor of marijuana"); *United States v. Soto*, 716 F.2d 989, 993 (2d Cir. 1983) (conspiracy conviction reversed where "no evidence whatever" linked defendant to conspiracy); *United States v. Lopez*, 625 F.2d 889, 895-97 (9th Cir. 1980) (conspiracy conviction reversed because no evidence defendant "had any knowledge" of illegal activity); *United States v. Batimana*, 623 F.2d 1366, 1369-70 (9th Cir. 1980) (defendants' convictions of heroin possession reversed where evidence showed third person took possession of drugs upon delivery and no evidence either defendant asserted dominion or control). However, because possession is a question of state law, *see* § 13-105(34), these federal decisions do not control here. Moreover, the Ninth Circuit has found cases such as *Batimana* and others involving small amounts of drugs inapplicable where "the sheer volume of the drugs and elaborate arrangements for their storage and transportation support[] a jury finding that the defendant knowingly collaborated in possessing contraband." *United States v. Valles-Valencia*, 811 F.2d 1232, 1240 (9th Cir. 1987).

to another person to commit the offense.'" *State v. King*, 226 Ariz. 253, ¶ 16, 245 P.3d 938, 943 (App. 2011), *quoting* A.R.S. § 13-301 (alteration in *King*). The timing of Valenzuela's arrival and his immediate admittance to the house, which was used only to process marijuana, as well as the large quantity of marijuana on the premises and his flight from the scene when officers arrived, supported an inference that he was not merely present but also intended to assist the other men in processing the marijuana. *See State v. Lester*, 11 Ariz. App. 408, 410, 464 P.2d 995, 997 (1970) (intent rarely provable by direct evidence and ordinarily must be proved by circumstantial evidence). Accordingly, the jury properly could have found him guilty as an accomplice, even if it did not find he had possessed the marijuana.

¶16 Valenzuela also argues the trial court should have granted his Rule 20 motion as to the marijuana because it granted his Rule 20 motion on the paraphernalia charge and "the *sole* evidentiary distinction between the marijuana and the paraphernalia was that some of the marijuana was in plain view upon entry into the house whereas the paraphernalia was not." We find this argument unpersuasive. Acquittal of the paraphernalia charge does not support acquittal of the marijuana charge because the paraphernalia charge required the state to prove an additional element: it was required to show that Valenzuela had used or had intended to use the paraphernalia for drug-related purposes, A.R.S. § 13-3415(A), whereas the marijuana charge required the state to show only that Valenzuela had the right to control the marijuana, § 13-3405(A), or aided in its processing or distribution, § 13-301. Thus, there is no inconsistency between the trial

court's granting Valenzuela's Rule 20 motion as to the paraphernalia but not the marijuana.

¶17 Finally, we reject Valenzuela's argument that the trial court erroneously denied his motion for a new trial under Rule 24.1, Ariz. R. Crim. P., because the jury's verdict was against the weight of the evidence. We review a trial court's ruling on a motion for a new trial for an abuse of discretion, *State v. Mincey*, 141 Ariz. 425, 432, 687 P.2d 1180, 1187 (1984), and will not disturb the denial of such a motion "if there is evidence to support the verdict," *State v. Quintana*, 92 Ariz. 308, 310, 376 P.2d 773, 774 (1962). As discussed above, substantial evidence supported Valenzuela's conviction; accordingly, we cannot say the court abused its discretion in denying his motion for a new trial on this ground.

Improper Argument

¶18 Valenzuela next contends the trial court erred in denying his motion for a new trial on the ground the state's closing argument was improper. *See* Ariz. R. Crim. P. 24.1(c)(2) (court may grant new trial based on prosecutorial misconduct). Specifically, Valenzuela objects to a portion of the state's closing argument in which the prosecutor posed the questions to the jury: "But why was he there; if not to be involved in this operation, then why? What other reason could he have been there for?" Valenzuela maintains this was a comment on his decision not to testify and improperly shifted the burden of proof to the defense to provide an alternative, noncriminal explanation for his presence at the house.

¶19 As the state points out, although Valenzuela objected, he did not do so on the ground that the prosecutor's statement was a comment on his decision not to testify. He has therefore forfeited review of that argument for all but fundamental error. *See State v. Roque*, 213 Ariz. 193, ¶ 154, 141 P.3d 368, 403 (2006); *see also State v. Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d 682, 683-84 (App. 2008) (objection on one ground insufficient to preserve issue for appeal on different ground not argued). Consequently, he "must establish both that fundamental error exists and that the error in his case caused him prejudice." *State v. Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d 601, 607 (2005).

¶20 To obtain reversal of a conviction based on prosecutorial misconduct, Valenzuela must show "(1) misconduct exists and (2) 'a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying defendant a fair trial.'" *State v. Morris*, 215 Ariz. 324, ¶ 46, 160 P.3d 203, 214 (2007), *quoting State v. Anderson*, 210 Ariz. 327, ¶ 45, 111 P.3d 369, 382 (2005). A "prosecutor may not comment upon the neglect or refusal of the defendant to be a witness in his own behalf." *State v. Cannon*, 118 Ariz. 273, 274, 576 P.2d 132, 133 (1978); *see* A.R.S. § 13-117(B). A comment on a defendant's failure to testify at trial violates his or her constitutional rights, *State v. White*, 16 Ariz. App. 279, 282, 492 P.2d 1217, 1220 (1972), and constitutes fundamental error. *State v. Still*, 119 Ariz. 549, 551, 582 P.2d 639, 641 (1978). In such a case, prejudice is presumed. *State v. Smith*, 101 Ariz. 407, 410, 420 P.2d 278, 281 (1966). To determine whether the argument was in fact improper, we must determine whether the prosecutor's comments were "calculated to point out to the jury

that [Valenzuela] had not taken the stand in his own defense." *Cannon*, 118 Ariz. at 274, 576 P.2d at 133.

¶21 In *State v. Blackman*, 201 Ariz. 527, 38 P.3d 1192 (App. 2002), this court found that the prosecutor had not commented on the defendant's failure to testify despite making the statement, "There is no evidence in this record, no evidence from anyone who was there [to contradict the victim's testimony]," and twice referring to the victim's testimony about a sexual encounter with the defendant as "uncontradicted." *Id.* ¶¶ 72-76. Here, when viewed in context, the prosecutor's question did not call the jury's attention to Valenzuela's failure to testify; rather, we are satisfied that the prosecutor used the question to introduce a brief discussion of the evidence supporting the state's theory that the only plausible explanation for Valenzuela's presence at the house was to help process marijuana for distribution. The question did not challenge Valenzuela to provide an explanation for his presence, but rather urged the jury to think of any plausible, noncriminal explanation, after considering the state's evidence, for Valenzuela's presence at a house that was used only for drug processing. And weighing such evidence is within the jury's province. *See State v. Clifton*, 134 Ariz. 345, 348, 656 P.2d 634, 637 (App. 1982). Thus, this is not a situation where "'the jury would naturally and necessarily perceive [the prosecutor's argument] to be a comment on the failure of the defendant to testify,'" *Blackman*, 201 Ariz. 527, ¶ 74, 38 P.3d at 1209, *quoting State v. Schrock*, 149 Ariz. 433, 438, 719 P.2d 1049, 1054 (1986), and we accordingly find no prosecutorial misconduct based on an improper reference to Valenzuela's decision not to testify.

¶22 We likewise disagree with Valenzuela's argument that the comment constituted impermissible burden shifting. Because he made this argument below, we review the trial court's ruling on this ground for an abuse of discretion. *See State v. Anaya*, 170 Ariz. 436, 441, 825 P.2d 961, 966 (App. 1991). A defendant is not required to prove that he was merely present at the scene of a crime; rather, the state has the burden of proving all elements of the offense beyond a reasonable doubt. *State v. Mincey*, 130 Ariz. 389, 398, 636 P.2d 637, 646 (1981); *State v. Sucharew*, 205 Ariz. 16, ¶ 32, 66 P.3d 59, 69 (App. 2003). However, a prosecutor's comments on a defendant's failure to put on evidence to support his or her defense do not impermissibly shift the burden of proof to the defendant "so long as such comments are not intended to direct the jury's attention to the defendant's failure to testify." *State v. Sarullo*, 219 Ariz. 431, ¶ 24, 199 P.3d 686, 692 (App. 2008).

¶23 Here, as noted above, the prosecutor's question did not direct the jury's attention to Valenzuela's failure to testify. Nor did it imply that Valenzuela had a burden to prove he was merely present. Rather, the comment rhetorically presented the state's theory that the only plausible reason for Valenzuela's presence in the house was to help process the marijuana. Moreover, just before the prosecutor made the comment, he reminded the jury,

> I, as the State, I have all the burden of proof, proof beyond a reasonable doubt. You have to hold me to that burden. This burden at no time shifts to the defense. They don't have to prove anything to you, nothing. That is all on me.

¶24 The trial court similarly instructed the jury that the state has the sole burden of proof. And our supreme court has held that such an instruction cures any harm caused by a prosecutor's implying that the defendant had the burden of proof. *See State ex rel. McDougall v. Corcoran*, 153 Ariz. 157, 160, 735 P.2d 767, 770 (1987); *see also State v. Newell*, 212 Ariz. 389, ¶¶ 68-69, 132 P.3d 833, 847 (2006) (jurors presumed to follow court's instructions). We find the prosecutor's closing argument did not improperly shift the burden to Valenzuela, and, in any event, the court's instructions would have cured any such harm. Accordingly, the trial court did not abuse its discretion in denying Valenzuela's motion for a new trial on grounds related to prosecutorial misconduct.

Disposition

¶25 For all the foregoing reasons, Valenzuela's conviction and sentence 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