FILED BY CLERK
NOV 29 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. IGNACIO ANTONIO VILLA-CARRANZA, Appellant.	2 CA-CR 2011-0383 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20111518001

Honorable Teresa Godoy, Judge Pro Tempore
Honorable John S. Leonardo, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani, Joseph T. Maziarz, and
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K E L L Y, Judge.

¶1 After a jury trial, appellant Ignacio Villa-Carranza was convicted of sale of a narcotic drug. The trial court found Villa-Carranza had committed the offense while on parole and that he had a prior felony conviction, and sentenced him to the presumptive, 9.25-year prison term. On appeal, Villa-Carranza argues the court erred by allowing the state to elicit "expert testimony that anyone present during a drug transaction has a role to play and that drug dealers never allow an unknowing person to be present." For the reasons stated below, we affirm.

¶2 "'We view the facts in the light most favorable to sustaining the jury's verdict and resolve all reasonable inferences against [the appellant].'" *State v. Fiihr*, 221 Ariz. 135, ¶ 3, 211 P.3d 13, 14 (App. 2008), *quoting State v. Lopez*, 209 Ariz. 58, ¶ 2, 97 P.3d 883, 884 (App. 2004). Before trial, Villa-Carranza filed a motion in limine to preclude expert testimony "that no drug dealing organization would allow a non-participating person (person without knowledge) to transport drugs or to be present in a vehicle from which drugs were being sold," arguing such testimony should be precluded as irrelevant and unfairly prejudicial. At the hearing on the motion, the trial court found inadmissible expert testimony that would link drug courier profile evidence to the facts in the present case, but concluded the state could present expert testimony regarding the general manner in which drug transactions occur. The court denied Villa-Carranza's

motion, but granted his request to instruct the jury that the state's expert was not expressing the opinion that what generally occurs in drug transactions occurred here.[1]

¶3 The state presented evidence that in April 2011, a Tucson police officer facilitated the purchase of heroin by a confidential informant from "Julio," the front-seat passenger of the vehicle Villa-Carranza was driving. At least three surveillance officers observed from a distance as the informant entered the vehicle Villa-Carranza had driven to a parking lot. After the officers removed Villa-Carranza and Julio from the vehicle at gunpoint, they found "45 little packages [of heroin] in clear plastic baggies" on the floor of the passenger side of the car within reach of the driver; "multiple cell phones within the front passenger compartment" that "were ringing nonstop" during the officers' investigation; and $20 bills on the front passenger seat and floor area. Detective Josh Cheek testified that during an interview with Villa-Carranza, he had admitted the following: he was the driver of the vehicle in which the officers had "contacted" him; he knew that Julio, a friend of his, sold heroin, but "he did not realize that Julio was going to sell heroin on [the] day" the underlying offense occurred; after receiving a telephone call, Julio had asked Villa-Carranza to drive to a nearby location at which an individual entered the car and gave Julio money, and Julio gave the individual a plastic package "of something"; and finally, Villa-Carranza had been arrested in 2009 for possession of

[1]It is undisputed that defense counsel did not request such an instruction at trial, nor did the trial court provide it. Although the contemplated instruction would have been helpful, based on the record before us, the outcome at trial would not have been different even if the instruction had been given.

heroin, "specifically for driving another individual around while that individual sold heroin."

¶4 Cheek also testified that as an officer in the Counter Narcotics Alliance Unit, he had been involved in "hundreds" of narcotics investigations and understood how heroin and narcotics are sold. He described a typical sale as beginning with a telephone call, followed by a meeting in a public place, often a parking lot, with the transfer of drugs taking place inside a vehicle. Payment is typically in cash "because drug dealing is a cash business." Cheek testified he looks for scales and the presence of multiple cellular telephones. He added that there are often two people in the seller's vehicle, to provide "two sets of eyes to look out for law enforcement" and "to look out for potential robbers." He explained that although selling drugs is an illegal activity, it nonetheless is a "business." "[I]t is a job, and in my experience, everybody has a job, and everybody gets paid. Whether that job is to drive around while another individual makes deliveries or whether that job is . . . for one individual to collect money while another individual hands out illegal drugs." He also testified that because of the value of the drugs and money involved, sellers are "not going to want somebody who's not involved in that activity to be present."

¶5 Villa-Carranza argues the trial court violated his due process rights by allowing Cheek to comment on his guilt, the ultimate issue before the jury. He maintains Cheek's testimony should have been precluded for the following reasons: it was irrelevant "because the state offered no evidence about the nature of the organization or

'dealer' involved here"; it invaded the province of the jury in violation of Rule 704, Ariz. R. Evid.; this was not a complex case requiring such testimony; and, the evidence was unfairly prejudicial. He specifically challenges Cheek's testimony that "one of the operating principles of [drug trafficking] organizations is that they do not permit people to be present with the drugs or to transport the drugs unless those people are involved by 'having a role to play and getting paid.'"

¶6 We review the trial court's evidentiary rulings for an abuse of discretion. *State v. Abdi*, 226 Ariz. 361, ¶ 21, 248 P.3d 209, 214 (App. 2011). Under former Rule 704, Ariz. R. Evid.,[2] "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." And the law is clear that it is not an "abuse of discretion [to] permit[] [a] police officer to state his opinion and the basis for it" as an expert in drug cases. *State v. Keener*, 110 Ariz. 462, 466, 520 P.2d 510, 514 (1974); *see also State v. Carreon*, 151 Ariz. 615, 617, 729 P.2d 969, 971 (App. 1986) ("A police officer's expert testimony concerning whether drugs were possessed for sale has long been admissible in this state.").

¶7 Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Former Ariz. R. Evid. 401. Here, the

[2]*See* Ariz. Sup. Ct. Order No. R-10-0035 (Sept. 8, 2011). All references to the Arizona Rules of Evidence in this decision refer to the former version of the rules.

challenged portion of Cheek's testimony focused on explaining the general habits and practices of drug trafficking organizations, and it was therefore relevant and potentially helpful to the jury. *See State v. Gonzalez*, 229 Ariz. 550, ¶ 16, 278 P.3d 328, 332 (App. 2012) (testimony limited to general practices of drug organizations proper). Moreover, although Villa-Carranza acknowledges that modus operandi testimony generally is permissible, he nonetheless argues that it should not be permitted when its effect would amount to the improper use of profile evidence. But, to the extent Cheek's testimony was actually profile evidence, as opposed to evidence of modus operandi, it was admitted properly to rebut Villa-Carranza's mere presence defense. *See United States v. Beltran-Rios*, 878 F.2d 1208, 1212-13 (9th Cir. 1989) (profile testimony may be proper rebuttal when defense opens door to line of inquiry). Moreover, despite his mere presence defense, it does not appear Villa-Carranza offered any innocent explanation for driving the vehicle from which the heroin was sold.

¶8 Villa-Carranza also maintains the court improperly admitted Cheek's testimony about drug trafficking because it conflicted with our supreme court's holding in *State v. Lee*, 191 Ariz. 542, 959 P.2d 799 (1998). He asserts "[h]ere, as in *Lee*, [Cheek's testimony] should not have been admitted because 'its only purpose was to suggest that because the accuseds' behavior was consistent with that of known drug couriers, they likewise must have been couriers." We disagree. As the court noted in *Lee*, "there may be situations in which drug courier profile evidence has significance beyond the mere suggestion that because an accused's conduct is similar to that of other

proven violators, he too must be guilty." *Id.* ¶ 19. One such situation is the "use of drug courier profile testimony to 'assist the jury in understanding modus operandi in a complex criminal case.'" *Id.* ¶ 11, *quoting United States v. Cordoba*, 104 F.3d 225, 230 (9th Cir. 1997). Although this case is not necessarily factually complex, modus operandi evidence is not limited to complex drug courier cases. *See Gonzalez*, 229 Ariz. 550, n.4, 278 P.3d at 333 n.4.

¶9 Villa-Carranza further contends Cheek's testimony was unfairly prejudicial, as it "amounted to his opinion that Villa-Carranza's story was false." Under Rule 403, Ariz. R. Evid., evidence 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). This case is unlike *Lee*, where the court found the use of drug courier profile evidence "as substantive proof of guilt" improper and concluded the "evidence . . . should not have been admitted . . . since its only purpose was to suggest that because the accuseds' behavior was consistent with that of known drug couriers, they likewise must have been couriers." *Lee*, 191 Ariz. 542, ¶¶ 18, 24, 959 P.2d at 803, 804. Here, as the state correctly asserts, Cheek did not describe a typical drug courier in an "attempt to link [Villa-Carranza] to that description."

Rather, he described the general practices of drug dealers in order to help the jury better understand how such individuals conduct business.

¶10 For the reasons stated above, Villa-Carranza'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