IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 05/02/2013
RUTH A. WILLINGHAM, CLERK
BY: GH

STATE OF ARIZONA,	)	1 CA-CR 12-0251
	)	
Appellee,	)	DEPARTMENT C
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
	)	Rule 111, Rules of the
BRUCE EVERETT NEWMAN,	)	Arizona Supreme Court)
	)	
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2011-142437-001

The Honorable Lisa Ann VandenBerg, Judge *Pro Tempore*

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
by Joseph Maziarz, Acting Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Barbara A. Bailey, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Tennie B. Martin, Deputy Public Defender
Attorneys for Appellant

T H U M M A, Judge

¶1 Bruce Everett Newman appeals his conviction and term of probation imposed after the superior court found him guilty

of misdemeanor possession of marijuana. Finding no reversible error, the conviction and imposition of probation are affirmed.

FACTS AND PROCEDURAL HISTORY[1]

¶2 Around 8:00 p.m. one evening in February 2011, Scottsdale Police Officer Ashton, conducting a routine traffic stop, stopped Newman for driving a sport utility vehicle (SUV) with an expired license plate. Newman said he had borrowed the SUV from a friend. Having determined Newman had outstanding traffic warrants, Officer Ashton arrested him and placed him in the back of his police car. Officer Ashton then impounded the SUV and conducted an inventory search. During the search, Officer Ashton found an orange pill bottle under the SUV's rear seat, located directly behind the center console and within reach of the driver. Officer Ashton testified that the bottle contained rolling papers and a "green leafy substance," which from his training and experience he recognized as marijuana.

¶3 Officer Ashton then returned to his police car with the bottle. Although Officer Ashton never showed Newman the bottle or asked him about it, Newman volunteered the following statement: "Sir, the marijuana you found is strictly for recreational use. I work in the medical profession and that

[1] Upon review, this court views the facts in the light most favorable to sustaining the verdict and resolves all inferences against Newman. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

would kill me." Officer Ashton testified that he immediately recorded the statement in his notepad.

¶4 Newman testified at trial and denied making this statement. Instead, Newman claimed that Officer Ashton, once inside the patrol car, showed him the bottle. Although Newman said he was not sure what was inside the bottle, he told Officer Ashton "it wasn't mine, that I can't be in possession of marijuana due to my job." Newman could not recall what, if anything, Officer Ashton asked him about the bottle.

¶5 After a bench trial, the court found Newman guilty of possession of marijuana, a Class 1 misdemeanor, in violation of Arizona Revised Statutes (A.R.S.) section 13-3405,[2] and sentenced him to supervised probation for eighteen months. Newman filed a timely appeal; this court has jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1), 13-4031 and -4033(A).

DISCUSSION

¶6 Newman presents two issues on appeal: first, whether the superior court committed fundamental error by admitting his statements about the bottle, which Newman argues were involuntary, and second, whether there was sufficient evidence for the court to deny his motion for a judgment of acquittal.

[2] Absent material revisions since the relevant dates, statutes cited refer to the current version unless otherwise indicated.

I. Voluntariness.

¶7 Newman argues his statements about the marijuana were involuntary and that the superior court erred by failing to sua sponte hold a voluntariness hearing. Because Newman did not raise these issues with the superior court, this court's review is for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Fundamental error is error that goes "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." *Id*. (citation omitted).

¶8 Although upon filing a timely objection, a defendant has a right to a hearing to resolve any voluntariness issue, "[t]he trial court is not required to [s]ua sponte enter upon an examination to determine the voluntary nature of evidence." *State v. Smith*, 114 Ariz. 415, 419, 561 P.2d 739, 743 (1977). At least by inference, Newman's argument implicates custodial interrogation concerns. A conversation initiated voluntarily by a defendant does not constitute custodial interrogation, *State v. Mauro,* 159 Ariz. 186, 192, 766 P.2d 59, 65 (1988), and a spontaneous statement does not violate *Miranda,*[3] *State v. Carter,* 145 Ariz. 101, 106, 700 P.2d 488, 493 (1985). "[C]oercive police activity is a necessary predicate" to a finding of

[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966).

involuntariness. *Colorado v. Connelly*, 479 U.S. 157, 167 (1986); *see also State v. Boggs*, 218 Ariz. 325, 335–36, ¶ 44, 185 P.3d 111, 121–22 (2008) (requiring "a causal relation between the coercive [police] behavior and the defendant's overborne will" to find a confession involuntary).

¶9 Although arguing he was vulnerable to the possibility of coercion, Newman does not point to a specific instance of coercive police conduct. Newman argues that seeing the bottle as Officer Ashton was walking toward the police car caused his will to be overcome. Even if Newman saw the bottle before he volunteered his admission, Newman has not shown how the officer's allowing him to see the bottle would be impermissibly coercive.

¶10 Officer Ashton testified that Newman's statement was made spontaneously and that no coercion occurred. Moreover, Newman does not contend he would have presented additional evidence rebutting Officer Ashton's testimony at a voluntariness hearing, had he requested such a hearing. On this record, where Newman never requested a voluntariness hearing and never objected to the admissibility of his statements during trial, the superior court did not err in admitting the statements about the marijuana without holding a voluntariness hearing. *See, e.g., Smith*, 114 Ariz. at 419, 561 P.2d at 743. Further, the record does not show that Newman involuntarily made the

statements. Nothing in the exchange between Officer Ashton and Newman suggests the police coerced his statements, as would be necessary to deem a statement involuntary. *See, e.g., Connelly,* 479 U.S. at 167.

II. Sufficiency Of The Evidence.

¶11 Newman argues the superior court erred by denying his motion for a judgment of acquittal, claiming the State failed to show that he possessed the marijuana or that he did so knowingly. A judgment of acquittal is appropriate only "if there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(a). A Rule 20 motion should be denied if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Cox*, 217 Ariz. 353, 357, ¶ 22, 174 P.3d 265, 269 (2007) (citation omitted). This court will not reverse a judgment based on the credibility of a witness, but rather leaves credibility determinations to the finder of fact. *See State v. Alawy*, 198 Ariz. 363, 365, ¶ 7, 9 P.3d 1102, 1104 (App. 2000).

¶12 To convict Newman, the State had to prove beyond a reasonable doubt that he knowingly possessed marijuana. A.R.S. § 13-3405(A)(1). Knowingly means "that a person is aware or believes that" the substance possessed was marijuana. A.R.S. § 13-105(10)(b); *State v. Arce*, 107 Ariz. 156, 483 P.2d 1395 (1971). Possession may be either actual or constructive. A.R.S.

§ 13–105(34). "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." *State v. Cox,* 214 Ariz. 518, 520, ¶ 10, 155 P.3d 357, 359 (App. 2007) (citation omitted). "[B]oth knowledge and possession may be shown by circumstantial evidence." *State v. Hull*, 15 Ariz. 134, 135, 486 P.2d 814, 815 (1971).

¶13 Newman argues the State failed to prove he knew of the marijuana because he was not the owner of the SUV and because he never made a statement showing knowledge of the marijuana. Although not the owner of the SUV, Newman was in possession of the SUV when the drugs were found. Officer Ashton testified that Newman volunteered that "the marijuana you found is strictly for recreational use." Although Newman denied making that statement, he testified that he told Officer Ashton "it wasn't mine, that I can't be in possession of marijuana due to my job." This testimony from Newman himself properly could be construed as admitting he knew of the bottle, knew that the bottle contained marijuana and knew that the bottle was in the SUV. Because substantial evidence supported the finding that Newman knowingly possessed marijuana, the court did not err by denying Newman's motion for judgment of acquittal. A.R.S. § 13-3405(A)(1).

CONCLUSION

¶14 Newman's conviction and sentence are affirmed.

/S/_____
SAMUEL A. THUMMA, Presiding Judge

CONCURRING:

/S/_____
MICHAEL J. BROWN, Judge

/S/_____
DIANE M. JOHNSEN, Judge