IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

CHRISTOPHER JAMES LAZO, *Appellant*.

No. 1 CA-CR 20-0394
FILED 6-15-2021

Appeal from the Superior Court in Mohave County
No. S8015CR201801056
The Honorable Billy K. Sipe, Judge *Pro Tempore*

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Gracynthia Claw
Counsel for Appellee

Law Office of Mark Tallan, Phoenix
By Mark D. Tallan
Counsel for Appellant

MEMORANDUM DECISION

Judge Cynthia J. Bailey delivered the decision of the Court, in which Presiding Judge Paul J. McMurdie and Judge Lawrence F. Winthrop joined.

B A I L E Y, Judge:

¶1 Christopher James Lazo appeals his convictions and sentences for transportation of dangerous drugs for sale, transportation of narcotic drugs for sale, possession of marijuana, three counts of possession of drug paraphernalia, and misconduct involving weapons. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Lazo and Ernest Pina were arrested after a search of their car revealed nearly a pound of methamphetamine and 2 kilos of cocaine. A grand jury indicted both men with transportation of dangerous drugs for sale (methamphetamine), narcotic drugs for sale (cocaine), marijuana for sale, three counts of possession of drug paraphernalia, and misconduct involving weapons. Lazo filed a motion to suppress, alleging that the stop and warrantless search were unlawful.

¶3 At the suppression hearing, Arizona Department of Public Safety Trooper Brandon Dyson testified that he was stationed on Interstate 40 near the border of California when he saw the passenger tires of a tan Chevy Suburban cross the fog line. The tires hit the rumble strip, making an audible sound. Dyson saw the car make an abrupt correction back into the lane and continue moving at about five miles under the speed limit. Dyson followed the Chevy and saw it cross the fog line a second time. It was 11 p.m. and the road was straight and free of obstructions. Dyson ran the Chevy's license plate through the Automated License Plate Reader ("ALPR"), a database that monitors the movement of vehicles on public roads. He learned that the Chevy had been driven east into California earlier that day and had made a similar one-day turn-around trip a few months earlier. Dyson initiated a traffic stop.

¶4 Contacting Pina and Lazo, Dyson smelled raw marijuana and saw an out-of-state marijuana dispensary bag in the second row of seats. Dyson also noticed an overwhelming smell of air fresheners and a radar detector mounted on the windshield, which raised his suspicions. Pina, the driver, said he was tired from driving all day. Determining that Pina was not impaired, Pina returned with Dyson to his vehicle to issue a warning. While completing the paperwork, Dyson asked Pina about his itinerary. Pina stated his cousin, Lazo, picked him up in Los Angeles earlier that day to give him a ride home to Texas, where both men lived. Dyson returned to the Chevy to obtain information for the warning and questioned Lazo at the same time. Lazo stated Pina was a friend, and he had been in California

for three days before making the trip back to Texas. Lazo also admitted there was a small amount of marijuana in the dispensary bag. Dyson issued the warning and returned Pina and Lazo's documents.

¶5 Dyson then asked Pina about the dispensary bag and was told that there was no marijuana in the car because Pina and Lazo had smoked it earlier in the day. Neither Lazo nor Pina volunteered a medical marijuana card, leading Dyson to believe that they did not have the marijuana legally. Based on the odor of marijuana, the conflicting information between Pina and Lazo and Lazo and the ALPR, Dyson detained Lazo and Pina and searched the Chevy. Dyson found marijuana in the dispensary bag, a methamphetamine pipe, a THC vape cartridge, six cell phones in the center console, a pound of methamphetamine and two kilo packages of cocaine behind a plastic panel in the vehicle's rear cargo compartment on the driver's side, and a 9mm handgun behind a panel underneath the dashboard.

¶6 The trial court denied the motion to suppress. The court found that Dyson, who had over 15 years of experience, had reasonable suspicion for the stop because the traffic deviations and the time of night indicated a tired or impaired driver. The court further found that the search was permitted under the automobile exception. Dyson developed probable cause based on the smell of marijuana, Lazo and Pina's conflicting stories, and the belief that neither Lazo nor Pina had a legal basis for possessing marijuana in Arizona.

¶7 At trial, Dyson testified to the stop, the ALPR data, and the search. After the State rested, Lazo moved for a directed verdict of acquittal. The court denied the motion, except for the transportation of marijuana count, which the court reduced to possession of marijuana. The jury found Lazo guilty as charged and found an aggravating factor, the presence of an accomplice, on the two transportation counts. Lazo filed a motion for a new trial based on juror misconduct. After holding an evidentiary hearing, the trial court denied the motion. The court sentenced Lazo to concurrent prison and jail terms, the longest being 13 years flat. Lazo timely appealed. We have jurisdiction under Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and -4033(A)(1), (2).

DISCUSSION

A. Motion to Suppress

¶8 Lazo argues that the trial court erred in denying his motion to suppress because Dyson lacked probable cause for the traffic stop and to search the car.[1] We review the denial of a motion to suppress and a court's factual findings for an abuse of discretion. *State v. Cheatham*, 240 Ariz. 1, 2, ¶ 6 (2016); *State v. Evans*, 237 Ariz. 231, 233, ¶ 6 (2015). "Whether the probable cause determination here comports with the Fourth Amendment is a mixed question of law and fact that we review de novo." *Cheatham*, 240 Ariz. at 2, ¶ 6. Our review is limited to the evidence presented at the suppression hearing.[2] *State v. Rojo-Valenzuela*, 237 Ariz. 448, 452, ¶ 15 n.2 (2015).

¶9 The Fourth Amendment provides that a person is free from unreasonable searches and seizures. An officer with articulable, reasonable suspicion of criminal activity may make a brief investigatory stop of a person or vehicle based on the totality of the circumstances. *State v. Teagle*, 217 Ariz. 17, 23, ¶ 20 (App. 2007). "Officers cannot act on a mere hunch, but seemingly innocent behavior can form the basis for reasonable suspicion if an officer, based on training and experience, can perceive and articulate meaning in given conduct[,] which would be wholly innocent to the untrained observer." *State v. Boteo-Flores*, 230 Ariz. 105, 108, ¶ 12 (2012) (citations omitted). If probable cause exists, then a vehicle may be searched without a warrant under the automobile exception. *State v. Reyna*, 205 Ariz. 374, 375, ¶ 5 (App. 2003). Probable cause is defined as "when reasonably trustworthy information and circumstance would lead a person of reasonable caution to believe that a suspect has committed an offense." *State v. Hoskins*, 199 Ariz. 127, 137–38, ¶ 30 (2000). The odor of marijuana can be the basis of probable cause, unless based on the totality of the circumstances, probable cause is dispelled by indicia of AMMA-compliant possession or use. *Cheatham*, 240 Ariz. at 3, ¶¶ 11-12; *State v. Sisco*, 239 Ariz. 532, 537, ¶¶ 17-18 (2016).

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[1] Lazo also argues that the officer's use of the ALPR data constituted an unlawful search. However, the issue is waived because Lazo failed to raise it in his suppression motion. *See State v. Bush*, 244 Ariz. 575, 588, ¶ 49 (2018).

[2] Lazo argues for the first time on appeal that he possessed a Texas medical marijuana card and so his possession of the marijuana in the dispensary bag was in compliance with the Arizona Medical Marijuana Act ("AMMA"). Lazo did not present this evidence at the suppression hearing or to Trooper Dyson during the traffic stop. Therefore, we will not consider it on review and find the argument waived.

¶10 Here, Dyson had reasonable suspicion of lane-usage violations to justify the traffic stop. *See* A.R.S. § 28-729(1). Dyson observed the Chevy cross the fog line twice despite the road being straight and free of obstructions. *C.f. State v. Livingston*, 206 Ariz. 145, 148, ¶ 12 (App. 2003) (finding no violation of the lane-usage statute when the defendant "drove safely on a dangerous, curved road apart from her alleged isolated and minor breach of the shoulder line"). Based on his training and experience and the time of night, Dyson had reasonable suspicion that the driver of the Chevy could be impaired or tired. *See State v. Winter*, 146 Ariz. 461, 466 (App. 1985) *abrogated on other grounds*; *State v. Acosta*, 166 Ariz. 254, 257 (App. 1990).

¶11 We further find that Dyson had probable cause to search the Chevy. Dyson smelled raw marijuana, as well as the strong, concealing odor of air fresheners. Lazo and Pina gave conflicting accounts of their relationship. Lazo's story also conflicted with the ALPR data, which showed his Chevy travelled to California earlier that same day and not three days prior as he claimed. Dyson considered the AMMA implications of the dispensary bag, yet when questioned about the bag, neither Lazo, nor Pina volunteered evidence that they were AMMA-compliant. Based on the totality of the circumstances, there was probable cause to search the vehicle under the automobile exception.

¶12 Because Dyson had reasonable suspicion to stop the car and probable cause to search it, the trial court did not abuse its discretion by denying the motion to suppress.

B. Juror Misconduct

¶13 Lazo next argues that the trial court erred by denying his motion for a new trial based on alleged juror misconduct. After the verdict, Lazo discovered that one of the seated jurors, Juror 32, failed to disclose prior law enforcement experience during voir dire. Lazo filed a motion for a new trial, and the trial court held an evidentiary hearing.

¶14 At the hearing, Juror 32 testified that he had been a detention officer with the Mohave County Sheriff's Office for two months during the year before trial. Juror 32 worked only twelve days at the Mohave County Detention Center before being let go after an arrest. Juror 32 later served nine days in jail due to the arrest; the entire time spent in protective custody. While he remembered the judge asking the jury panel about law enforcement experience, he thought it only applied to current service. Knowing now that the question encompassed past and present experience,

Juror 32 agreed that he should have disclosed his prior employment to the court. Juror 32 also admitted to not "actively listening" during voir dire. The trial court denied the motion for a new trial, finding that Juror 32 misunderstood the voir dire question and did not intentionally conceal his prior experience. The court further found no evidence of bias or prejudice.

¶15 We review the denial of a motion for a new trial based on alleged juror misconduct for an abuse of discretion. *State v. Manuel*, 229 Ariz. 1, 8, ¶ 40 (2011). A juror commits misconduct by "perjuring himself . . . or willfully failing to respond fully to a direct question posed during the voir dire examination." Ariz. R. Crim. P. 24.1(c)(3)(C). "[J]uror misconduct warrants a new trial [only] if the defense shows actual prejudice or if prejudice may be fairly presumed from the facts." *State v. Cruz*, 218 Ariz. 149, 163, ¶ 68 (2008) (alterations in original) (quoting *State v. Miller*, 178 Ariz. 555, 558 (1994)).

¶16 Here, we find no evidence that Juror 32 willfully concealed his prior law enforcement experience, and the record is void of actual or presumed prejudice. Nothing from Juror 32's testimony indicated that he committed perjury or willfully concealed a bias during voir dire. The trial court, who is in the best position to observe a juror's bias, found none. *See State v. Glassel*, 211 Ariz. 33, 48, ¶ 47 (2005) (citing *Wainwright v. Witt*, 469 U.S. 412, 424 (1985)). Further, we cannot find any prejudice. Juror 32 was a detention officer for two months and did not interact with or learn anything about Lazo or Pina while working in his position. Other potential jurors were struck for cause after disclosing ties to law enforcement but only after indicating that they could not be fair or impartial. Juror 32 did not indicate that he could be anything but fair and impartial. *See State v. Kolmann*, 239 Ariz. 157, 163, ¶ 27 (2016) (defendant "was entitled to an impartial jury, not a particular jury"). Lazo alleges substantial prejudice but fails to cite any evidence from the record. Thus, the trial court did not abuse its discretion in denying the motion for a new trial.

C. Incorrect Jury Instruction

¶17 Lastly, Lazo argues that the trial court confused the jury by giving the incorrect verbal definition for "marijuana" during final jury instructions. Because Lazo failed to object below, our review is limited to fundamental error. *State v. Escalante*, 245 Ariz. 135, 138, ¶ 1 (2018).

¶18 After the State and the defense rested, the trial court provided written copies of the final jury instructions to each member of the venire. The judge then read the instructions aloud. While reading the instruction

for "marijuana," the judge incorrectly said "methamphetamine" and then gave the definition for marijuana.[3] Surprisingly, neither party objected nor corrected the judge.

¶19 Lazo contends that the jury could have been misled by this incorrect verbal instruction and convicted Lazo of the transportation of dangerous drugs charge based on the marijuana found in the car. However, there is no evidence that the jury was misled and "[m]ere speculation that the jury was confused is insufficient to establish actual jury confusion." *State v. Bass*, 198 Ariz. 571, 577, ¶ 17 (2000) (quoting *State v. Gallegos*, 178 Ariz. 1, 11 (1994)). The jury submitted several questions to the court but not about the definition of marijuana or methamphetamine. More compelling is the fact that the jury received the correct definition of "marijuana" in their written instructions. *See Bass*, 198 Ariz. at 577, ¶ 18 ("the jurors' confusion, if any, would have been dispelled by the error-free written instruction which correctly advised them of their charge."). Other than the one instance, we find no other instances of marijuana and methamphetamine confusion or substitution during the trial. *Contra State v. Moody*, 208 Ariz. 424, 466, ¶ 192 (2004) ("The error in giving the incorrect jury instruction was compounded by the prosecutor, who argued the improper instruction to the jury."). Thus, we find no evidence of juror confusion and no fundamental error.

CONCLUSION

¶20 For the above reasons, we affirm Lazo's convictions and sentences.

AMY M. WOOD • Clerk of the Court
FILED: AA

[3] The judge read the jury instruction: "'Methamphetamine' means all parts of any plant of the genus cannabis, from which the resin has not been extracted, whether grown or not, and the seeds of such plant. Marijuana does not include the mature stalks of such plants or the sterilized seed of such plant which is incapable of germination."