DIVISION ONE
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RUTH WILLINGHAM, ACTING CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	No. 1 CA-CR 10-0067
	)	DEPARTMENT E
v.	)	**MEMORANDUM DECISION** (Not for Publication - Rule 111, Rules of the Arizona Supreme Court)
RYAN MCNEAL, Appellant.	)	

Appeal from the Superior Court in Maricopa County

Cause No. No. CR2008-007523-003DT

The Honorable Paul J. McMurdie, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

Bruce F. Peterson, Maricopa County Legal Advocate — Phoenix
By Consuelo M. Ohanesian, Deputy Legal Advocate
Attorneys for Appellant

S W A N N, Judge

¶1 Ryan McNeal ("defendant") timely appeals his convictions of conspiracy to commit sale or transportation of marijuana in violation of A.R.S. §§ 13-1003 and -3405, and sale

or transportation of marijuana in excess of two pounds in violation of A.R.S. § 13-3405. Pursuant to *Anders v. California,* 386 U.S. 738 (1967), and *State v. Leon,* 104 Ariz. 297, 451 P.2d 878 (1969), defense counsel has advised us that a thorough search of the record has revealed no arguable question of law, and requests that we review the record for fundamental error. *See State v. Richardson*, 175 Ariz. 336, 339, 857 P.2d 388, 391 (App. 1993). Defendant was given an opportunity to file a supplemental brief *in propria persona* and did not do so.

FACTS AND PROCEDURAL HISTORY[1]

¶2 On April 23, 2008, Phoenix police officers in the Commercial Narcotic Interdiction Unit received a tip that a "suspicious parcel" was being shipped from Georgia to a residence on Milada Drive in Phoenix.[2] Officers examined the package at the parcel company and saw that it had "all of the indicators" to raise suspicion of "distribution of either money from one part of the country to the other or drugs." The parcel was seized and sniffed by a certified narcotics dog, but the dog

[1] On appeal, we view the evidence in the light most favorable to sustaining the conviction. *State v. Tison,* 129 Ariz. 546, 552, 633 P.2d 355, 361 (1981).

[2] Officers also received a "ticket tip" regarding the travel plans of a co-defendant that also alerted them of a possible drug transaction. A "ticket tip" helps officers identify subjects who may travel into Phoenix with a large amount of currency.

"did not alert to the package." A search of the package was conducted pursuant to a warrant and officers found twenty to twenty-five jumbo vacuum bags of the type used to ship illegal drugs. Officers resealed the package and allowed it to be delivered.

¶3 While the package was searched, other officers began surveillance at the Milada residence. Around 10:30 a.m., a black Mercedes and another vehicle entered the garage and the garage door closed behind them. Around 11 a.m., defendant drove the black Mercedes out of the garage. Officers followed defendant to a nearby casino and watched him and the Mercedes while defendant gambled for about two hours. When defendant left the casino, officers followed him to a pharmacy parking lot, where he parked the Mercedes next to a blue Grand Marquis and got into the passenger seat of that vehicle. When the Grand Marquis left the parking lot, an F-150 truck followed. An officer followed both vehicles and noticed that the back of the Grand Marquis was "weighted down." The Grand Marquis and F-150 arrived at the Milada residence at about 2:15 p.m. The Grand Marquis entered the garage while the F-150 slowly drove through the neighborhood "conducting security or countersurveillance to make sure there [was] no law enforcement present in the area." At approximately 2:50 p.m., the Grand Marquis backed out of the garage onto the street; the vehicle's rear end appeared to ride

higher. The F-150 pulled up next to the Grand Marquis and the truck's passenger accepted a black bag from the Grand Marquis' driver. The Grand Marquis and the F-150 left the neighborhood.

¶4 Officers stopped both vehicles. An officer detained defendant and conducted a pat-down for weapons; none were found. A drug dog sniffed the exterior of the Grand Marquis and "gave an alert" near the front passenger-side quarter-panel. No drugs were found on the defendant, but an officer confiscated a cell phone and "several" bundles of cash amounting to "four to five thousand dollars" that defendant asserted came from the casino. An officer searched the interior passenger compartment of the Grand Marquis. He found no contraband but smelled "a very strong" odor of marijuana from inside the vehicle. In the vehicle's trunk, an officer found two bales of marijuana wrapped in plastic wrap. Defendant was arrested and transported to the police station. At the station, a detective issued *Miranda* warnings to defendant and he agreed to answer questions.

¶5 In the F-150, officers found $94,000 in cash in a black bag on the back seat, a .45-caliber pistol cocked with a round in the chamber, and extra ammunition. During a search of the residence pursuant to a warrant, officers found sixteen bales of marijuana, shrink wrap, shipping boxes, packing peanuts, vacuum sealers, a heavy-duty electronic weighing scale, and a drug ledger.

¶6 Defendant was charged with conspiracy to possess marijuana for sale in excess of four pounds and/or transportation of marijuana greater than two pounds ("count 1"), sale or transportation of marijuana in excess of two pounds ("count 2"), two counts of possession of marijuana for sale in excess of four pounds, and possession of drug paraphernalia. Before trial, defendant moved to suppress evidence found in the traffic stop and the residence. The motions were denied. Defendant also moved for a trial separate from his co-defendants and the trial court denied that motion.

¶7 The case against defendant and a co-defendant was tried to a jury over seven days. Several times during trial, defendant re-urged severance and moved for a mistrial, but the motions were denied. At the conclusion of the state's case, defendant moved for a judgment of acquittal pursuant to Arizona Rule of Criminal Procedure ("Rule") 20. The motion was denied. The jury found defendant guilty of counts 1 and 2. Defendant was sentenced to concurrent mitigated terms of four years on each count and given 251 days of presentence incarceration credit.

DISCUSSION

¶8 We have read and considered the briefs submitted by counsel and have reviewed the entire record. *Leon,* 104 Ariz. at 300, 451 P.2d at 881. We find no fundamental error. All of the

proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure, and the sentence imposed was within the statutory range. Defendant was present at all critical phases of the proceedings and represented by counsel. The jury was properly impaneled and instructed. The jury instructions were consistent with the offenses charged. The record reflects no irregularity in the deliberation process.

I. MOTION TO SUPPRESS EVIDENCE

¶9 Before trial, defendant filed a motion to suppress evidence found when officers stopped the Grand Marquis, alleging the warrantless stop was "illegal" because it was "pretextual" and officers lacked reasonable suspicion and probable cause. After an evidentiary hearing, the trial court denied the motion.[3]

¶10 Police may briefly stop and detain a vehicle if they have a reasonable suspicion, based on a totality of circumstances, that criminal activity is occurring. *State v.*

[3] Defendant filed two other motions to suppress that were denied without oral argument. In a challenge to the canine sniff of the Grand Marquis, defendant –- a passenger in the vehicle -- failed to demonstrate that he had a reasonable expectation of privacy in the vehicle or property seized. *See State v. Nadler,* 129 Ariz. 19, 21, 628 P.2d 56, 58 (App. 1981). In the second challenge, defendant sought to join a co-defendant's motion to suppress evidence obtained from the residence. But that motion failed to demonstrate that defendant had an expectation of privacy in the residence because he was not, for example, an overnight guest or present when the search was conducted. *See State v. Gissendaner,* 177 Ariz. 81, 84, 865 P.2d 125, 128 (App. 1993); *State v. Calvery,* 117 Ariz. 154, 156, 571 P.2d 300, 302 (App. 1977).

O'Meara, 198 Ariz. 294, 295-96, ¶ 7, 9 P.3d 325, 326-27 (2000). The likelihood of criminal activity need not rise to the level of probable cause. *Id.* at 296, ¶ 10, 9 P.3d at 327.

¶11 Here, the totality of the circumstances was sufficient for officers to believe that criminal activity was occurring in the Grand Marquis, giving the officers reasonable suspicion to stop the vehicle. Officers received a tip that a suspicious package was arriving in Phoenix and the package had well-known indicators that it was being used to distribute illegal drugs. Police observed defendant enter and leave the residence to which the "suspicious" package was mailed, meet another individual, and return to the Milada residence. Officers watched an F-150 follow the Grand Marquis and provide "security" when the Grand Marquis, with a weighted trunk, entered the Milada residence. When the Grand Marquis left the garage, officers watched the passenger in the F-150 receive a plastic bag from the Grand Marquis. An officer observed that the Grand Marquis's trunk appeared lighter. On this evidence, the trial court properly denied defendant's motion to suppress.

II. MOTION TO SEVER

¶12 Seven days before the start of trial, defendant moved to sever his trial from the other co-defendants, asserting that his co-defendants had "antagonistic/mutually exclusive defense[s]," that a joint trial would create a "rub-off" or

"spill-over effect," and that each defendant would be unable to receive an "individualized, fair and just determination" of guilt.[4] *See* Rule 13.4 (describing the grounds for a motion to sever and requiring such motion to be filed twenty days prior to trial); *State v. Grannis,* 183 Ariz. 52, 58, 900 P.2d 1, 7 (1995) (giving the trial court discretion to sever a trial after it "balance[s] the possible prejudice to the defendant against interests of judicial economy"), *disapproved on other grounds by State v. King,* 225 Ariz. 87, 235 P.3d 240 (2010). The trial court denied the motion.

¶13 Rule 13.4(a) "requires a court to sever the trials of defendants on motion of a party if 'necessary to promote a fair determination of the guilt or innocence of any defendant of any offense.'" *Grannis,* 183 Ariz. at 58, 900 P.2d at 7 (quoting Rule 13.4). In the interest of judicial economy, however, joint trials are the rule rather than the exception. *State v. Murray,* 184 Ariz. 9, 25, 906 P.2d 542, 558 (1995). To succeed in challenging a denial of severance, a defendant "must demonstrate compelling prejudice against which the trial court was unable to protect." *State v. Cruz,* 137 Ariz. 541, 544, 672 P.2d 470, 473 (1983). Prejudice can occur when co-defendants present

[4] The record does not contain a response from the State, but it does indicate that defendant's motion made the "same argument" that a co-defendant filed earlier, and the trial court denied defendant's motion for the "same" reason as it denied the co-defendant's motion.

antagonistic, "mutually exclusive" defenses. *Murray,* 184 Ariz. at 25, 906 P.2d at 558. However, "the mere presence of hostility between co-defendants, or the desire of each co-defendant to avoid conviction by placing the blame on the other does not require severance." *Cruz,* 137 Ariz. at 544, 672 P.2d at 473.

¶14 Here, the defendant and co-defendant were involved in "different aspects of the conspiracy."[5] Their defenses were not "mutually exclusive" because the jury was not required to disbelieve the core evidence offered on behalf of one defendant in order to convict the other. *See State v. Kinkade,* 140 Ariz. 91, 93, 680 P.2d 801, 803 (1984). Additionally, when prompted by the court, defendant was unable to articulate any prejudice except that each would "point[] the finger" at the other. We note too that the jurors were instructed that they must consider "each defendant separately" and determine guilt based on the individual defendant's conduct and the evidence which applies to that defendant, "as if the defendant were being tried alone." We presume that jurors follow their instructions. *State v. Velazquez,* 216 Ariz. 300, 312, ¶ 50, 166 P.3d 91, 103 (2007).

[5] Co-defendant's personal belongings were found in an upstairs bedroom at the Milada residence, including a driver's license and airline ticket. He was also the subject of the "ticket tip" that alerted officers to a possible drug transaction.

III. SHIFTING BURDEN OF INNOCENCE

¶15 Twice during trial, defendant moved for a mistrial, asserting that the state had shifted the burden onto the defendant to prove his innocence. Both times the trial court denied the motion.

¶16 "The prosecutor may properly comment upon the defendant's failure to present exculpatory evidence, so long as the comment is not phrased to call attention to the defendant's own failure to testify" and the defendant is not the only one who could explain or contradict the evidence. *State v. Fuller,* 143 Ariz. 571, 575, 694 P.2d 1185, 1189 (1985). "A declaration of a mistrial is the most dramatic remedy for trial error and should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted." *State v. Adamson,* 136 Ariz. 250, 262, 665 P.2d 972, 984 (1983). If a witness makes an inadmissible statement, a trial court "must evaluate the situation and decide if some remedy short of mistrial will cure the error." *Id.*

¶17 Here, the lack of fingerprint, DNA, and handwriting analysis was raised throughout the trial. For example, on the fourth day of trial, the state asked an officer during redirect, whether the officer would have completed fingerprint analysis "if [the defense] asked for" it, and the defense objected to the question and requested a mistrial. After a bench conference,

during which the trial court heard from all parties and reviewed case law, the trial court denied the motion and stated it would issue a limiting instruction. Officers also offered testimony about the process by which such testing is ordered. For example, the supervising officer testified during the state's case-in-chief that he did not order additional testing based on the "time and the cost" such testing required. Another officer testified that fingerprint and DNA testing were not typically ordered in drug cases because the identities of suspects are generally known during the investigation. Still another officer clarified that "case agents" -- not just any officer involved in the case -- are responsible to order such testing.

¶18 The state also referenced this line of questioning during its closing argument, which prompted the following colloquy.

> [State]: Much has been said about fingerprints and DNA and handwriting exemplars. The only thing I agree with [co-defendant's counsel] on is that, yes, in fact, it is the State's burden of proof. Absolutely. The Defendants do not have any burden to provide any evidence whatsoever. But you heard that they had access to the bales of marijuana.
>
> [Defense]: Objection. Burden shifting.
>
> [State]: To the ledger.
>
> THE COURT: Overruled.

[State]: To the ledger, to the scales, to the food saver bag, to the parcel, to the plastic bags, and they could have asked that fingerprint analysis could have been done, DNA analysis could have been done. They could have provided a handwriting sample to an expert to compare the handwriting on the ledger. Neither [defendant's counsel] or [co-defendant's counsel] did that. I wonder why.

[Defense]: Objection.

The trial court sustained the objection and struck the state's comment. During the ensuing bench conference, defendant moved for a mistrial. The trial court denied the motion, but immediately re-instructed the jury that a defendant was not required to produce evidence of any kind and the state had the burden of proving its case beyond a reasonable doubt.

¶19 On this record we find no error.

IV. RULE 20 MOTION

¶20 A judgment of acquittal is appropriate only when there is "no substantial evidence to warrant a conviction." Rule 20. Substantial evidence is such proof that "reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt." *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990). "Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to

support the conviction." *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996).

¶21 The state presented substantial evidence of guilt on count 1 (conspiracy to commit sale or transportation of marijuana) and count 2 (sale or transportation of marijuana in excess of two pounds).

¶22 "A person commits conspiracy if, with the intent to promote or aid the commission of an offense, such person agrees with one or more persons that at least one of them or another person will engage in conduct constituting the offense and one of the parties commits an overt act in furtherance of the offense . . . ." A.R.S. § 13-1003 (A). Circumstantial evidence is sufficient to support a conspiracy conviction. *See State v. Aguirre,* 27 Ariz. App. 637, 639, 557 P.2d 569, 571 (App. 1976) ("Since a conspiracy is generally covert, it must be established in most cases by circumstantial evidence."). "Any action sufficient to corroborate the existence of an agreement to commit the unlawful act and to show that it is being put into effect supports a conspiracy conviction." *State v. Arredondo,* 155 Ariz. 314, 316-17, 746 P.2d 484, 486-87 (1987). But, "[m]ere knowledge or approval of, or acquiescence in, the object and purpose of a conspiracy without an agreement to cooperate in achieving such object or purpose does not make one a party to conspiracy." *Id.* at 317, 746 P.2d at 487.

¶23 A person commits a class 2 felony when he knowingly transports for sale and/or sells more than two pounds of marijuana. A.R.S. § 13-3405(B)(11). The prosecution must prove that the defendant knowingly transported marijuana and knew it was marijuana. *State v. Fierro,* 220 Ariz. 337, 340, ¶ 12, 206 P.3d 786, 789 (App. 2008). Constructive possession is sufficient. *See State v. Chabolla-Hinojosa,* 192 Ariz. 360, 364, 965 P.2d 94, 98 (App. 1998).

¶24 Although the defendant denied knowledge of the marijuana in the Grand Marquis, officers testified that the odor of marijuana was "very strong" from inside the vehicle and it was "overwhelming" from inside the garage -- two places the defendant was present. From this evidence, a reasonable juror could conclude that defendant had knowledge of the marijuana. The state also presented sufficient evidence from which a reasonable juror could conclude that defendant had dominion and control of the marijuana, and that defendant helped plan and facilitate the sale. *See Arredondo,* 155 Ariz. at 317, 746 P.2d at 487. The state demonstrated that defendant knew both the owner of the house ("Robbins") and the driver of the Grand Marquis ("Felipe"). A warranted search of defendant's cell phone demonstrated that it contained a text message sent to Robbins on April 22 that stated, "Everything is straight for tomorrow." The cell phone also contained evidence of telephone

calls made between defendant, Robbins, and Felipe between 1:58 p.m. and 2:16 p.m. on April 23, corresponding to the time defendant met Felipe and the time they returned to the Milada residence. Evidence also demonstrated that the trunk of the Grand Marquis was loaded down as it traveled to the Milada residence and was lighter when it left. The parties stipulated that the marijuana found in the house weighed 209 pounds and the marijuana found in the Grand Marquis weighed 22 pounds.

¶25 On this evidence, a reasonable juror could have found defendant guilty of both counts.

CONCLUSION

¶26 We affirm defendant's convictions and sentences. Counsel's obligations pertaining to defendant's representation in this appeal have ended. Counsel need do nothing more than inform defendant of the status of the appeal and his future options, unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). On the court's own motion, defendant shall have thirty days from the date of this decision to proceed, if he so desires, with an *in propria persona* motion for reconsideration or petition for review.

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
PHILIP HALL, Presiding Judge

/s/
_____
SHELDON H. WEISBERG, Judge