**IN THE COURT OF APPEALS**
**STATE OF ARIZONA**
**DIVISION ONE**

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FILED: 06/07/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

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| STATE OF ARIZONA, Appellee, | ) | 1 CA-CR 10-0178 |
| | ) | DEPARTMENT A |
| v. | ) | **MEMORANDUM DECISION** |
| | ) | (Not for Publication - |
| HENRY SCOTT VANDER, | ) | Rule 111, Rules of the |
| | ) | Arizona Supreme Court) |
| Appellant. | ) | |

Appeal from the Superior Court in Maricopa County

Cause No. CR2006-140355-001DT

The Honorable Connie Contes, Judge

**AFFIRMED**

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

Sharmila Roy — Laveen
Attorney for Appellant

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**T H O M P S O N, Judge**

**¶1** Henry Scott Vander (appellant) appeals the trial court's denial of his motion to suppress evidence and argues the

prosecutor's comment made in closing argument was improper and so prejudicial as to warrant a new trial. For the following reasons, we affirm.

## I. FACTUAL AND PROCEDURAL HISTORY

**¶2** In July 2006, Phoenix Police Officers Hillman and Mendez were on duty in plain clothes and an unmarked police car. On the way to a QT convenience store, they drove through the parking lot of an AM/PM gas station. Officer Hillman observed a woman standing near the AM/PM looking around as if she was waiting for someone, and observed a man in the driver's seat of a blue Toyota pickup truck, parked near the payphones, who appeared suspicious. Officer Mendez went inside the QT while Officer Hillman stayed in the car to keep a visual sight of the AM/PM.

**¶3** Shortly thereafter, appellant pulled into the AM/PM parking lot in a white Mitsubishi 3000 GT, about twenty feet from where the woman was standing. The woman walked directly up to the driver's window, which was rolled down, and leaned into the window with her hands inside the car. After approximately 20 or 30 seconds, the woman stepped back from the Mitsubishi with one of her hands "cupped" as if she was holding something. She drove away in a white Chevy truck.

**¶4** Immediately after the white Chevy left, the blue Toyota pickup Officer Hillman had noticed earlier pulled into the parking space next to appellant's Mitsubishi. Appellant exited his car

holding a blue object in his hand and got into the passenger side of the Toyota pickup. After about 30 seconds to a minute, appellant returned to his Mitsubishi, still holding the blue object. The Toyota pickup drove away. After the Toyota left, appellant stepped out of his vehicle and placed the blue object underneath the driver's side of his vehicle. Based on his training and experience, Officer Hillman believed he had observed illegal drug sales, and that appellant was the dealer.

**¶5** Officer Hillman radioed for a marked patrol unit to assist in initiating a traffic stop of appellant's vehicle based on his belief that appellant had engaged in illegal drug sales and on appellant's traffic violations when pulling out from the gas station. Officer Ramsey responded to Hillman's request and obtained appellant's identification and other information. When Officer Mendez approached appellant at the traffic stop, who was sitting in the front seat of his vehicle, he immediately noticed a slight odor of marijuana coming from appellant's vehicle. Officer Hillman also smelled marijuana as appellant stepped out of the car.

**¶6** Officer Hillman asked appellant what he had been doing at the AM/PM. Appellant answered that he had been "getting gas." The officers also asked appellant about the marijuana smell, to which appellant stated that the smell might be the "perfume" he was wearing.

**¶7** Officers Hillman and Mendez placed appellant under arrest and Officer Hillman searched appellant's vehicle. Officer Hillman reached under the car where appellant had placed the blue object and retrieved a blue, plastic M&Ms candy container with magnets taped to it. It appeared to be the same blue item the officers observed appellant holding earlier. Inside the container were plastic baggies containing methamphetamine with a value of $210 to $280 and cocaine, valued between $325 and $425. A search of appellant's person yielded $60 in $20 bills in his pocket and another $73 in his wallet.

**¶8** Appellant was charged with one count of possession of dangerous drugs for sale (methamphetamine), a class 2 felony, and one count of possession of narcotic drugs for sale (cocaine), a class 2 felony. Appellant filed a motion to suppress evidence, arguing that the search of his vehicle was the result of an illegal pre-textual stop in violation of the Arizona and U.S. Constitutions. The trial court conducted an evidentiary hearing and denied appellant's motion to suppress.

**¶9** In the beginning of the state's closing argument, the prosecutor made the following statement to the jury: "In July of 2006, ladies and gentlemen, the defendant, Henry Vander, was involved in the sale of illegal drugs. It wasn't till July 12th of 2006 when he was caught in the act at an AM/PM gas station . . ." Appellant objected, arguing the comment was improper. The trial

court overruled the objection and reminded the jury that what is said in closing argument is not evidence.

**¶10** The jury convicted appellant on both counts. At the sentencing hearing, appellant admitted the existence of two prior felony convictions. The trial court sentenced appellant to concurrent terms of 12.5 years imprisonment on each count. Appellant timely appealed. We have jurisdiction pursuant to Article VI, Section 9 of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) §§ 12-120.21(A)(1) (2003), 13-4031, and -4033(A)(2011).

## II. DISCUSSION

**¶11** Appellant raises two issues on appeal, which we consider in turn.

### A. Denial of Motion to Suppress

**¶12** We review a trial court's decision on a motion to suppress evidence for an abuse of discretion. *State v. Dean*, 206 Ariz. 158, 161, ¶ 9, 76 P.3d 429, 432 (2003). We consider only the evidence presented at the suppression hearing, viewed in the light most favorable to sustaining the trial court's ruling. *State v. Gay,* 214 Ariz. 214, 217, ¶ 4, 150 P.3d 787, 790 (App. 2007).

**¶13** Appellant argues that under *State v. Gant*, 216 Ariz. 1, 162 P.3d 640 (2007), affirmed by the United States Supreme Court in *Arizona v. Gant,* 129 S.Ct. 1710 (2009), the warrantless search of his vehicle was unreasonable because appellant was placed in

handcuffs under the control of an officer, and no exigencies existed to justify the search. Accordingly, appellant argues the drugs should have been suppressed under the poisonous fruit doctrine.

**¶14** We hold the search of appellant's car was a valid search incident to arrest, as it was reasonable for the officers to believe that evidence "relevant to the crime of arrest might be found" in appellant's car. *Gant,* 129 S.Ct. at 1719 (quoting *Thornton v. U.S.*, 541 U.S. 615, 632 (2004)). Appellant was arrested for engaging in drug transactions. Thus, it was reasonable for the officers to believe illegal drugs might be found in the vehicle. *See id.* (suggesting that arrest for drug offense supplies "basis for searching the passenger compartment of an arrestee's vehicle and any containers therein."). Officer Hillman observed appellant enter and exit the Toyota pickup with a blue container and place the container underneath his car. Officer Hillman testified that during the search, he went directly to the location where he watched appellant place the blue container.

**¶15** Alternatively, the search was supported by the automobile exception to the warrant requirement, which allows police officers to "search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained." *California v. Acevedo*, 500 U.S. 565, 580 (1991). In this case, the officers smelled the odor of marijuana emanating

from the interior of appellant's car and from appellant himself. The odor of marijuana provided the officers with probable cause to search appellant's vehicle. *State v. Reuben*, 126 Ariz. 108, 108-09, 612 P.2d 1071, 1071-72 (App. 1980) (odor of burnt marijuana gave officer probable cause to search vehicle).

**¶16** In addition, Officer Hillman's observations of appellant, in conjunction with his training and experience, which led him to conclude that the events were drug-related, all support a finding that the officers had sufficient probable cause to search appellant's vehicle. *See State v. Sumter*, 24 Ariz. App. 131, 134-35, 536 P.2d 252, 255-56 (1975)(probable cause supported search of co-defendant's vehicle where officers observed co-defendant's meeting with defendant who was involved in drug transactions and observed co-defendant's suspicious and evasive actions). Thus, we hold that the officers conducted a legitimate warrantless search of appellant's vehicle, and no abuse of discretion occurred in the trial court's denial of appellant's motion to suppress evidence.

**B. Prosecutor's Comment During Closing Argument**

**¶17** Appellant argues that his conviction should be reversed because the prosecutor improperly remarked about appellant's involvement in the sale of drugs in July 2006 and getting "caught in the act" on July 12. Appellant further contends that while the trial court did give an instruction stating that closing arguments are not evidence, the instruction was insufficient to overcome the

prejudice to appellant. Because the trial court is in the best position to determine the effect of a prosecutor's comments on the jury, we will not disturb the trial court's ruling absent a clear abuse of discretion. *State v. Lee,* 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997); *State v. Blackman*, 201 Ariz. 527, 545, ¶ 76, 38 P.3d 1192, 1210 (App. 2002).

**¶18** Although appellant objected to the prosecutor's closing argument, appellant did not ask the trial court to declare a mistrial and has raised this issue for the first time on appeal. Because "[a] defendant generally waives his objection to testimony if he fails either to ask that it be stricken, with limiting instructions given, or to request a mistrial," we only review for fundamental error. *State v. Ellison*, 213 Ariz. 116, 133, ¶ 61, 140 P.3d 899, 916 (2006).

**¶19** A prosecutor's comments constitute reversible error only when (1) they call the jury's attention to matters it is not entitled to consider in determining the verdict; and (2) it is probable that they affected the verdict. *State v. Hansen*. 156 Ariz. 291, 296-97, 751 P.2d 951, 956-57 (1988). In arguing a case to the jury, counsel are afforded "wide latitude" and "may comment on evidence and argue all reasonable inferences therefrom." *State v. Zinsmeyer*, 222 Ariz. 612, 620 ¶ 16, 218 P.3d 1069, 1077 (App. 2009)(quotation omitted).

**¶20** The prosecutor's remark that in July of 2006, appellant was "involved in the sale of illegal drugs" but not "caught in the act" until July 12 was a reasonable inference arising from the evidence presented at trial. *See State v. Morris*, 215 Ariz. 324, 336, ¶ 51, 160 P.3d 203, 215 (2007) (proper argument includes "reasonable inferences from the evidence"). The state presented evidence that appellant possessed methamphetamine worth between $210 and $280 and cocaine worth between $325 and $425. It is reasonable to infer that appellant procured the drugs, baggies, and container, and packaged the drugs sometime before July 12, 2006. All of these activities constitute involvement with the sale of drugs. Unlike *State v. Leon*, 190 Ariz. 159, 945 P.2d 1290 (1997), the case on which appellant relies, the prosecutor did not comment that he lacked inside information as to whether there were prior drug transactions. Moreover, in *Leon*, the prosecutor's statements regarding knowledge of "prior transactions" were improper as the trial court had excluded evidence of a prior transaction due to the state's late disclosure. 190 Ariz. at 162, 945 P.2d at 1293.

**¶21** Accordingly, we reject appellant's argument that the prosecutor's comment was improper, and hold the trial court did not abuse its discretion in overruling appellant's objection and immediately providing the jury with a curative instruction.

## III. CONCLUSION

**¶22** For the foregoing reasons, we affirm appellant's convictions.

/s/
JON W. THOMPSON, Judge

CONCURRING:

/s/
PHILIP HALL, Presiding Judge

/s/
LAWRENCE F. WINTHROP, Judge