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

STATE OF ARIZONA, Appellee, v. CAROL ANN GOLDEN, Appellant.	No. 1 CA-CR 10-0848 No. 1 CA-CR 10-0849 (Consolidated) DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication - Rule 111, Rules of the Arizona Supreme Court)
STATE OF ARIZONA, Appellee, v. ROBERT FELIX GOLDEN, Appellant.	

Appeal from the Superior Court in Mohave County

Cause Nos. CR2010-00033, CR2010-00032

The Honorable Steven F. Conn, Judge

AFFIRMED

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B R O W N, Judge

¶1 Robert Felix Golden ("Robert") and Carol Ann Golden ("Carol") appeal from their convictions for production of marijuana and possession of marijuana and drug paraphernalia.[1] They argue the trial court erred in denying their motion to suppress the marijuana and drug paraphernalia seized during a warrantless search of their home. Additionally, Robert argues there was insufficient evidence to support his convictions and the trial court erred in declining to give his requested "mere presence" jury instruction. For the following reasons, we affirm.

[1] Robert and Carol filed separate appeals from cause numbers CR2010-00032 and CR 2010-00033, respectively. Because Robert and Carol were tried together, and they both challenge the suppression order, in our discretion we have ordered consolidation of the two cases. We refer to them hereafter individually by their first names and collectively as "Defendants."

BACKGROUND

¶2 In October 2009, three officers went to a house in Mohave County after receiving a tip that the residents were growing marijuana. Detectives Barkhurst and Schoch knocked on the door and Carol answered. Barkhurst told her they had received a tip that there were marijuana plants in the backyard and he asked her for consent to remove the plants. She initially denied having any plants, but then responded, "so, say there is a marijuana plant; what would happen[?]" Barkhurst responded that he "was not taking her to jail that day; that [he] was going to issue them a summons to appear in court."

¶3 Carol explained that she did not want to go to jail because she had lupus. Barkhurst said he would prefer to obtain her consent to remove the plants instead of applying for a search warrant. Carol asked "if she would go to jail if the items were given voluntarily," and Barkhurst said "no," adding that he "would only summons her and her husband." Carol then informed the officers of two marijuana plants and said they could retrieve them. She led the detectives through the garage and into the backyard, where Barkhurst "immediately smelled the marijuana, and then observed the marijuana plants."

¶4 After the detectives removed the plants, Carol let them enter the house, where they smelled "a very strong odor of burnt marijuana." Carol handed them a "little plate that had

some marijuana on it, and a pipe." The detectives also seized bags containing a marijuana bud, marijuana leaves, and marijuana seeds, two sets of hemostats,[2] and rolling papers. Before leaving, Barkhurst asked Carol to have Robert, who was not at home at the time, call him.

¶5 Robert called Barkhurst the next day. The detective asked Robert "if the plants were his or his wife's." Robert responded that Barkurst "was going to have to get up earlier than that to get him." Robert also stated that "he was not at the residence when [the detectives] were there, so [the plants] weren't in his possession."

¶6 Defendants were charged with production of marijuana, a class 5 felony; possession of marijuana, a class 6 felony; and possession of drug paraphernalia, also a class 6 felony. Carol moved to suppress the evidence seized from the warrantless search of the home, and Robert joined in the motion.

¶7 Carol testified at the suppression hearing that she gave permission because of the "duress" she was under and that she believed Barkhurst would incarcerate her if she did not consent. On cross-examination, she clarified that the duress she was under was due to the fear of going to jail. She further

[2] Barkhurst explained that hemostats are "medical [] forceps, or tweezers," used "to smoke the last little bit of a marijuana cigarette."

testified that she would not have granted permission if they had not promised they would not take her to jail.

¶8 The trial court denied the motion to suppress, noting that Carol had relied on the statement made by Barkhurst about not going to jail but that his comment was not a promise. Instead, the court found it was "just a statement of fact as to what's going to happen," relying on *State v. Lopez*, 174 Ariz. 131, 847 P.2d 1078 (1992). Thus, the court determined the State had met its burden of proving there was a valid consent to the search. A jury subsequently convicted Defendants on all three counts. The trial court ordered that Robert and Carol be placed on probation for two years and these timely appeals followed.

DISCUSSION

¶9 Defendants assert that the trial court abused its discretion in denying their motion to suppress marijuana and drug paraphernalia obtained from a warrantless search of their residence. Additionally, Robert asserts that (1) the trial court abused its discretion in declining to give his requested "mere presence" instruction in favor of its own similarly worded instruction; and (2) there was insufficient evidence for the jury to convict him of any of the counts.

A. Denial of Motion to Suppress

¶10 Defendants argue that Carol did not voluntarily consent because she gave permission to search in reliance on

Barkhurst's alleged promise that if Carol consented to the search, she would not go to jail. Denial of a motion to suppress evidence is reviewed for an abuse of discretion. *State v. Dean*, 206 Ariz. 158, 161, ¶ 9, 76 P.3d 429, 432 (2003). An abuse of discretion occurs when "no reasonable judge would have reached the same result under the circumstances." *State v. Armstrong*, 208 Ariz. 345, 354, ¶ 40, 93 P.3d 1061, 1070 (2004). An appellate court considers only the evidence presented at the suppression hearing, viewing that evidence 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). We defer to the court's factual findings, including those regarding credibility of witnesses and reasonable inferences, but review *de novo* the ultimate legal determination. *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996).

¶11 The United States and Arizona Constitutions protect against unreasonable searches and seizures. U.S. Const. amend. IV; Ariz. Const. art. II, § 8. Warrantless searches are *per se* unreasonable unless an exception to the warrant requirement exists. *Katz v. United States*, 389 U.S. 347, 357 (1967). One such exception is consent. *State v. Davolt*, 207 Ariz. 191, 203, ¶ 29, 84 P.3d 456, 468 (2004). To be valid, consent must be voluntary. *State v. Guillen*, 223 Ariz. 314, 317, ¶ 11, 223 P.3d 658, 661 (2010). Evaluating the voluntariness of consent is a

factual inquiry based on the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 248-49 (1973).

¶12 In evaluating voluntariness, "[p]romises of benefits or leniency, whether direct or implied, even if only slight in value, are impermissibly coercive." *Lopez*, 174 Ariz. at 138, 847 P.2d at 1085. A statement is involuntary where: (1) there is a promise of a benefit or leniency made by law enforcement; and (2) the defendant relied on that promise in making the statement. *Id.*

¶13 Here, Appellants contend that Carol's consent to the search was "involuntarily given in reliance of the express promise . . . that if she showed [the detectives] her marijuana plants, she would not go to jail, with the obvious implication that if she did not show them her plants, then there was no guarantee that she would not go to jail." For this proposition, Appellants rely on *State v. Thomas*, 148 Ariz. 225, 714 P.2d 395 (1986), and *State v. McFall*, 103 Ariz. 234, 439 P.2d 805 (1968). In *Thomas*, the State failed to establish the voluntariness of the defendant's confession where the deputy told him that a confession would have a beneficial effect on his sentence, while a failure to confess would have a detrimental effect. 148 Ariz. at 227, 714 P.2d at 397. In *McFall*, the court found a confession involuntary based on an insinuation by police that gave defendant hope that he might receive drugs if he finished

the interview. 103 Ariz. at 236, 439 P.2d at 807. In both cases, law enforcement represented to the defendant that if he confessed, he would receive a potential benefit.

¶14 In contrast, the record here supports the trial court's reliance on *Lopez* in concluding that Barkhurst's statement that he would not take Carol to jail was not a promise. In *Lopez*, the defendant told the detective he was concerned that he would play a tape of their interview for the victim's mother. 174 Ariz. at 138, 847 P.2d at 1085. The detective told the defendant that he had no intention of playing the tape for the mother. *Id.* The *Lopez* court concluded that the detective's statement was not a promise but simply a statement of fact as to what was going to happen. *Id.*

¶15 We acknowledge that Carol testified that she consented to the search because Barkhurst promised that she would not go to jail if she did so. However, Barkhurst testified that he informed Carol that if she allowed them to take the marijuana plants, he would not be taking her or her husband to jail that day. He also testified that he never threatened he would take her to jail if she did not consent or if he had to obtain a warrant. Finding that Barkhurst did not make a promise, the trial court necessarily concluded that Barkhurst's testimony at the suppression hearing was more credible than Carol's. *See Gonzalez-Gutierrez*, 187 Ariz. at 118, 927 P.2d at 778 (deferring

to trial court's credibility determinations). Viewing the evidence in the light most favorable to sustaining the trial court's ruling, we find no abuse of discretion.

B. "Mere Presence" Instruction

¶16 Robert argues that the trial court abused its discretion in declining to give his requested "mere presence" instruction. We review the trial court's denial of a requested jury instruction for an abuse of discretion. *State v. Wall*, 212 Ariz. 1, 3, ¶ 12, 126 P.3d 148, 150 (2006). The court is not required to give a proposed instruction when its substance is adequately covered by other instructions. *State v. Garcia*, 224 Ariz. 1, 18, ¶ 75, 226 P.3d 370, 387 (2010) (quotations and citation omitted). Nor is it required to provide instructions "that do nothing more than reiterate or enlarge the instructions in defendant's language." *State v. Bolton*, 182 Ariz. 290, 309, 896 P.2d 830, 849 (1995). Rather, "the test is whether the instructions adequately set forth the law applicable to the case." *State v. Rodriguez*, 192 Ariz. 58, 61, 961 P.2d 1006, 1009 (1998). There is no reversible error "[w]here the law is adequately covered by instructions as a whole." *State v. Doerr*, 193 Ariz. 56, 65, ¶ 35, 969 P.2d 1168, 1177 (1998).

¶17 Robert requested that the trial court give the "mere presence" instruction from Standard Criminal 31 of the Revised Arizona Jury Instructions("RAJI"), which states:

> Guilt cannot be established by the defendant's mere presence at a crime scene, mere association with another person at a crime scene or mere knowledge that a crime is being committed. The fact that the defendant may have been present, or knew that a crime was being committed, does not in and of itself make the defendant guilty of the crime charged. One who is merely present is a passive observer who lacked criminal intent and did not participate in the crime.

Instead, the court gave the following instruction:

> The mere presence of the Defendant at the scene where an item is found is not sufficient by itself to show that the Defendant possessed the item. There must be presented specific facts showing that the Defendant knew of the item's existence and whereabouts.
>
> The fact that the Defendant may have been present at a crime scene and may have known that a crime was being committed does not in and of itself make the Defendant guilty of the crimes charged.

¶18 Like Robert's requested jury instruction, the trial court's instruction informed the jurors that mere presence at a crime scene or mere knowledge that a crime was being committed does not establish guilt. However, the trial court's instruction additionally instructed the jury that "[t]here must be presented specific facts showing that the defendant knew of the item's existence and whereabouts" to establish possession. The other substantive difference between the two instructions was the inclusion in Robert's requested instruction of an

additional statement that "mere association with another person at a crime scene" alone is not sufficient to establish guilt.

¶19 Robert argues that this additional language would have alleviated the jury's confusion over what evidence was needed for conviction, which he attributes to the question raised by the jury: "If knowing someone was growing and allowed marijuana to grow, is that production?" In response, the trial court informed the jurors they were to rely on the instructions already given. Robert contends that his requested instruction would have clarified for the jury that merely associating with someone with knowledge of a crime is insufficient to sustain a conviction. We disagree.

¶20 In *State v. Prasertphong*, 206 Ariz. 70, 75 P.3d 675 (2003), *vacated on other grounds*, 541 U.S. 1039 (2004), the defendant requested a jury instruction with "mere association" language similar to that proposed by Robert. The requested instruction in *Prasertphong* stated that the prosecution must prove "in addition to being present or knowing about the crime, *the defendant knowingly associated himself with the crime in some way as a participant*, as someone who wanted the crime to be committed, and not merely as a knowing spectator." *Id.* at 89, ¶ 75, 75 P.3d at 694 (emphasis added). Instead, the trial court gave a "mere presence" instruction nearly identical to the one given in the instant case: "The mere presence of a defendant at

the scene of a crime, together with knowledge a crime is being committed, is insufficient to establish guilt." *Id.* The defendant argued that the trial court's instruction was insufficient due to the lack of "mere association" language. *Id.* at ¶ 76. Our supreme court disagreed, holding that the trial court did not abuse its discretion in refusing to give the requested instruction because the court's instruction correctly stated the law, the requested instruction merely "reiterate[d] or enlarge[d] the instructions in defendant's language," and additional instructions "adequately informed the jury that [the defendant] could not be convicted of the crimes merely because he 'associated'" with a participant. *Id.* at ¶¶ 76-77.

¶21 Here, although the RAJI mere presence instruction requested by Robert would have informed the jury of the State's burden to prove possession more precisely than the instruction actually given by the trial court, we cannot say that the court abused its discretion. In addition to informing the jury that mere presence at a crime scene is insufficient to establish guilt, the court clarified that "[c]onstructive possession means that the item was not found on the person of the Defendant but in a place under his dominion and control" and that "[t]he evidence must link the Defendant to the item in a manner and to an extent that it shows that the Defendant knew of the existence and whereabouts of the item and that he had dominion and control

of the item." The court also instructed the jury on the presumption of innocence, the prosecution's burden of proof, and the elements of the offenses. These instructions, combined with the "mere presence" instruction, adequately informed the jury that it could not convict Robert merely because he associated with Carol or knew of the existence of the marijuana. *See Doerr*, 193 Ariz. at 65, ¶ 35, 969 P.2d at 1177 (finding no reversible error "[w]here the law is adequately covered by the instructions as a whole"). Finally, we note that during closing arguments Robert's counsel explained to the jury that "the fact that the defendant may have been present at a crime scene and may have known that a crime is being committed, does not in and of itself make the defendant guilty of the crime charged." *See State v. Bruggeman*, 161 Ariz. 508, 510, 779 P.2d 823, 825 (1989) ("Closing arguments of counsel may be taken into account when assessing the adequacy of jury instructions.").

¶22 Because the trial court's instructions as a whole accurately stated the law, and Robert had ample opportunity during the trial and in closing arguments to support his theory that he was merely present while Carol committed the crimes, his requested instruction would have merely "reiterate[d] and enlarge[d] the instructions in defendant's language." *Prasertphong*, 206 Ariz. at 89, ¶ 76, 75 P.3d at 694 (quotations

and citation omitted). Thus, the trial court did not abuse its discretion.

C. Sufficiency of the Evidence

¶23 Robert also asserts there was insufficient evidence for the jury to convict him of production of marijuana and possession of marijuana and drug paraphernalia. Specifically, he contends that the State failed to show that he exercised dominion or control over the marijuana and paraphernalia seized from his home.

¶24 There is sufficient evidence to support a verdict if, "viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Cox* (*Cox II*), 217 Ariz. 353, 357, ¶ 22, 174 P.3d 265, 269 (2007) (quotations and citation omitted). We will reverse a verdict only if "there is a complete absence of probative facts to support its conclusion." *State v. Mauro*, 159 Ariz. 186, 206, 766 P.2d 59, 79 (1988). Where the evidence supporting a verdict is challenged on appeal, we do not reweigh the evidence, but instead resolve all conflicts in favor of sustaining the verdict. *State v. Tison*, 129 Ariz. 546, 552, 633 P.2d 355, 361 (1981).

¶25 Count 1 charged Robert with production of marijuana. To "produce" means to "grow, plant, cultivate, harvest, dry,

process or prepare for sale." Ariz. Rev. Stat. ("A.R.S.") § 13-3401(29) (Supp. 2010).[3] Counts 2 and 3 charged Robert with possession of marijuana and drug paraphernalia. To "possess" means "knowingly to have physical possession or otherwise to exercise dominion or control over property." A.R.S. § 13-105(33) (2010).

¶26 A defendant may exercise dominion or control over an item without having physical possession. *State v. Petrak*, 198 Ariz. 260, 264, ¶ 11, 8 P.3d 1174, 1178 (App. 2000). "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* (*Cox I*), 214 Ariz. 518, 520, ¶ 10, 155 P.3d 357, 359 (App. 2007) (quotations and citation omitted). The State may establish constructive possession by proving the defendant's exercise of dominion or control over the contraband itself, or over the location in which it was found. *State v. Teagle*, 217 Ariz. 17, 27, ¶ 41, 170 P.3d 266, 276 (App. 2007). Proof of the defendant's exclusive possession or control is not required. *State v. Curtis*, 114 Ariz. 527, 528, 562 P.2d 407, 408 (App. 1977). Constructive possession may be shown by

[3] Absent material changes to the relevant statutes after the date of the offenses, we cite the current version.

circumstantial evidence. *State v. Villalobos Alvarez*, 155 Ariz. 244, 245, 745 P.2d 991, 992 (App. 1987).

¶27 Robert contends that the State failed to present sufficient evidence he, and not Carol, was growing the marijuana plants and possessed the marijuana and drug paraphernalia seized from the house. However, the State was not required to prove that he had exclusive control over the items seized, only that he had the right to control the locations in which they were found. *See Curtis*, 114 Ariz. at 528, 562 P.2d at 408. In addition, the State was required to present sufficient evidence to permit the reasonable inference that Robert had actual knowledge of the existence of the marijuana and drug paraphernalia. *See Cox I*, 214 Ariz. at 520, ¶ 10, 155 P.3d at 359.

¶28 There was sufficient evidence from which the jury could rationally have concluded that Robert produced marijuana. Carol told Barkhurst that Robert lived with her in the home. The detectives found two marijuana plants growing in the garden. While the plants were not visible from the street, they were clearly visible in the backyard. And steps had been taken to conceal the plants: one of the plants was tied down with ropes and stakes, bed sheets blocked visibility through the gate, and the block wall behind the plants was taller than in other areas of the garden.

¶29 There was also sufficient evidence that Robert possessed marijuana. In addition to the plants outside, the detectives found marijuana in plain view inside the home. Schoch found a bag of marijuana seeds on a shelf near the front doorway and a bag of marijuana leaves in the master bathroom. The detectives also testified concerning the obvious odor of raw marijuana emanating from the plants in the backyard and of burnt marijuana inside the home. And, Robert's flippant comments to Barkhurst the day after the search provided additional evidence of his awareness of the marijuana's existence.

¶30 As a resident of the home, Robert had dominion or control over both the backyard and the home's interior; thus, the jury could have rationally concluded that he had constructive possession of the marijuana and drug paraphernalia found in both locations. *See State v. Jenson*, 114 Ariz. 492, 493-94, 562 P.2d 372, 373-74 (1977) (concluding evidence showing defendant had lived "off and on" with his mother in home where marijuana was found was sufficient to establish possession); *see also State v. Villavicencio*, 108 Ariz. 518, 520, 502 P.2d 1337, 1339 (1972) (holding that cardboard box containing narcotics found on an open back porch attached to defendant's apartment that was accessible to other residents of complex was nevertheless under defendant's dominion and control).

¶31 In addition, the jury could have reasonably inferred that Robert had actual knowledge of the marijuana's existence when it could be readily seen and smelled both in the backyard and inside the home. *See State v. Murphy*, 117 Ariz. 57, 61, 570 P.2d 1070, 1074 (1977) (recognizing that when contraband is found in an individual's home "in an unsecluded or obvious place it is sufficient to sustain a verdict for possession"); *see also State v. Van Meter*, 7 Ariz. App. 422, 427, 440 P.2d 58, 63 (1968) (finding sufficient evidence of possession where drugs found in apartment defendant shared with roommate "in obvious places around the apartment where a person living in the apartment would have knowledge of their presence").

¶32 The jury could have also concluded that Robert had actual knowledge of the drug paraphernalia found in plain view both inside and outside the home. *See Murphy*, 117 Ariz. at 61, 570 P.2d at 1074. Drug paraphernalia includes "all equipment, products and materials of any kind which are used, intended for use or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packing, repackaging, storing, containing, concealing, injecting, ingesting, inhaling or otherwise introducing into the human body a drug." A.R.S. § 13-3415(F)(2) (2010). Carol handed Schoch a marijuana pipe, and there was an obvious odor of burnt marijuana

inside the home. Schoch found a bag containing marijuana leaves in the master bathroom and another bag containing marijuana seeds on a shelf near the front door. And the marijuana plants were supported by ropes, stakes, and wire cages and partially concealed from view using bed sheets.

¶33 In sum, we conclude that a rational trier of fact could have found the essential elements of each of the crimes beyond a reasonable doubt. *See Cox II*, 217 Ariz. at 357, ¶ 22, 174 P.3d at 269 (noting the relevant standard is whether a rational trier of fact could have found the essential elements of the crime from the evidence presented).

CONCLUSION

¶34 For the foregoing reasons, we affirm Defendants' convictions and sentences.

/s/
_____
MICHAEL J. BROWN, Presiding Judge

CONCURRING:

/s/
_____
PATRICIA K. NORRIS, Judge

/s/
_____
PHILIP HALL, Judge