FILED BY CLERK
NOV 30 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. AGUSTIN MEDINA, Appellant.	2 CA-CR 2010-0233 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20091359001

Honorable Terry L. Chandler, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
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Attorneys for Appellee

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V Á S Q U E Z, Presiding Judge.

¶1 After a jury trial, Agustin Medina was convicted of possession of marijuana for sale having a weight of four pounds or more and possession of drug paraphernalia. On appeal, Medina challenges the sufficiency of the evidence to support his convictions. He also contends the court erred in denying his motion to suppress evidence, admitting evidence of a drug ledger found in his wallet, and in giving an inappropriate limiting instruction regarding the jury's use of the drug ledger evidence. Finding no error, we affirm.

Factual Background and Procedural History

¶2 We view the facts in the light most favorable to sustaining the jury verdicts and resolve all reasonable inferences against Medina. *State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999). On April 1, 2009, the Counter Narcotics Alliance (CNA), a multi-agency drug task force, was conducting an undercover surveillance of a suspected "stash house" in Tucson. A white pickup truck pulled into the driveway, and three men got out of the vehicle and entered the house. Thirty minutes to an hour later, a man came out and moved the truck into a carport next to a shed located at the rear of the property. After two other men exited the house, the officers decided to conduct a "knock and talk investigation," directly approaching the three men standing near the vehicle and shed. The men, including Medina, agreed to talk to the officers and consented to a search of the residence, shed, and vehicle.

¶3 Department of Public Safety (DPS) Sergeant Morlock, the lead detective, then called a narcotics officer with a drug-detection dog to the rear of the property to conduct an investigation of the shed and truck. After the dog alerted at the passenger side

of the truck and at the bottom seam of the door to the shed, Detective Ray Ballesteros walked to the east side of the shed, looked through the window, and saw four bales of marijuana that later were determined to weigh 119 pounds. Medina and the two other men were placed under arrest.

¶4 Medina was advised of his rights pursuant to *Miranda*[1] and agreed to be interviewed at the scene by one of the detectives. At the conclusion of the interview, the detective searched Medina and found a cellular telephone, $1,000 in cash, and a wallet in Medina's pockets. Inside the wallet, the detective found a piece of paper containing handwritten notes, later identified as a drug ledger.

¶5 Medina was charged with possession of marijuana for sale having a weight of four pounds or more and possession of drug paraphernalia. He was convicted as charged, and the court imposed concurrent, substantially mitigated sentences totaling three years' imprisonment. This appeal followed.

Discussion

Sufficiency of the Evidence

¶6 Medina first argues the trial court abused its discretion in denying his motion for a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., which he made after closing arguments, because "[t]here was no evidence whatsoever to prove that [Medina] . . . committed any drug offense." Specifically, he argues the state did not meet its burden to prove he had possessed the marijuana because "[t]he evidence adduced at

[1]*Miranda v. Arizona*, 384 U.S. 436 (1966).

trial failed to show any ability for Medina to have . . . control of the marijuana or access to the shed [where it was found]." We review a trial court's denial of a motion for a judgment of acquittal for an abuse of discretion and "will reverse only if there is 'no substantial evidence to warrant a conviction.'" *State v. Leyvas*, 221 Ariz. 181, ¶ 33, 211 P.3d 1165, 1175 (App. 2009), *quoting* Ariz. R. Crim. P. 20. "'Substantial evidence is proof that reasonable persons could accept as sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt.'" *State v. Hall*, 204 Ariz. 442, ¶ 49, 65 P.3d 90, 102 (2003), *quoting State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996).

¶7 To support a conviction under A.R.S. § 13-3405(A)(2), the state needed to prove Medina knowingly had possessed marijuana for sale. "'Possess' means knowingly to have physical possession or otherwise to exercise dominion or control over property." A.R.S. § 13-105(34). "'Possession' means a voluntary act if the defendant knowingly exercised dominion or control over property." § 13-105(35). The term "dominion" means "'absolute ownership'" and the term "control" generally means to "'have power over.'" *State v. Tyler*, 149 Ariz. 312, 316, 718 P.2d 214, 218 (App. 1986), *quoting Webster's Third New Int'l Dictionary (Unabridged)* 496, 672 (1981).

¶8 Possession can be established either by a showing of actual physical possession of the drugs or by constructive possession. *State v. Cox*, 214 Ariz. 518, ¶ 10, 155 P.3d 357, 359 (App.), *aff'd*, 217 Ariz. 353, 174 P.3d 265 (2007). And in *State v. Villavicencio*, 108 Ariz. 518, 520, 502 P.2d 1337, 1339 (1972), our supreme court stated:

> Constructive possession is generally applied to those circumstances where the drug is not found on the person of the defendant nor in his presence, but is found in a place

> under his dominion and control and under circumstances from which it can be reasonably inferred that the defendant had actual knowledge of the existence of the narcotics. Exclusive control of the place in which the narcotics are found is not necessary.

"Constructive possession may be proven by direct or circumstantial evidence." *Cox*, 214 Ariz. 518, ¶ 10, 155 P.3d at 359. We conclude there was sufficient evidence to support Medina's convictions.

¶9 After his arrest, Medina stated he had been residing at the house for about three weeks. On the day of his arrest, Medina was seen arriving at the house in the white truck with his two co-defendants. Medina's first name had been written on the back of the vehicle's registration, and a receipt bearing his name was found in the center console. Just prior to his arrest, Medina was seen standing near the truck with the two other men who also lived at the house, and one of them had just pulled the truck out of the driveway and then backed it up to the shed where the marijuana was ultimately found. And, when Medina was searched following his arrest, the detective found $1,000 in cash and a drug ledger. Although circumstantial, this evidence was sufficient for the jury to find beyond a reasonable doubt that Medina, who lived on the property where the marijuana was found and who was connected to the truck that had backed up to the shed, constructively had possessed the marijuana.

Ruling on Motions to Suppress

¶10 Medina next contends the trial court erred by denying his motion to suppress because "[t]he initial search of the shed by officer Ballesteros was in violation

of the United States and Arizona Constitutions."[2] Before trial, Medina filed motions in limine seeking to preclude admission of the drug ledger found in his wallet and "all physical evidence illegally seized from [him]." The court denied the motions, concluding the drug ledger was admissible to show knowledge and that Medina's presence at the scene where the marijuana had been found was not mere accident or mistake and all the items taken from Medina's person were lawfully seized incident to arrest.

¶11 For the first time on appeal, Medina argues "[Ballesteros's] testimony indicates that he immediately entered the private premises, and looked into the window of the shed, prior to any consent being given by any party." And on that basis Medina maintains that "[a]ll subsequent statements, findings, and the search warrant obtained after the illegal search of the shed must be suppressed as fruits of the poisonous tree." In an appeal from a trial court's ruling on a motion to suppress, we generally review legal and constitutional issues de novo, *State v. Huerta*, 223 Ariz. 424, 426, 224 P.3d 240, 242 (App. 2010), considering only the evidence presented at the hearing on the motion and viewing the evidence in the light most favorable to sustaining the trial court's ruling, *State v. Gay*, 214 Ariz. 214, ¶ 4, 150 P.3d 787, 790 (App. 2007).

¶12 As noted above, however, Medina did not challenge the "initial search" of the shed at trial, as he does here, but instead contested whether there was probable cause to arrest him on the ground "there was . . . no evidence linking [him] to any criminal

[2]Because Medina "'makes no separate argument based on the state constitutional provision . . . we do not separately discuss it.'" *State v. Blakley*, 226 Ariz. 25, n.2, 243 P.3d 628, 630 n.2 (App. 2010), *quoting State v. Nunez*, 167 Ariz. 272, n.2, 806 P.2d 861, 863 n.2 (1991).

offense."[3] Medina has therefore forfeited this argument absent fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). But Medina does not argue that the trial court's admission of the evidence constituted fundamental error, and failure to argue fundamental error on appeal generally constitutes a waiver of the argument. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (defendant waives fundamental error review when defendant fails to argue fundamental error on appeal); *see also State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) (noting defendant's failure to argue fundamental error); *State v. Williams*, 220 Ariz. 331, ¶¶ 8-10, 206 P.3d 780, 783 (App. 2008) (waiver principle applies to constitutional claims and appellant has burden to establish fundamental error). The argument is therefore waived.

¶13 Even had Medina's argument been preserved for appellate review, we would find it without merit. At the suppression hearing, Morlock testified all three men had consented to a search of the entire premises within minutes of CNA's arrival and that the consent preceded Ballesteros's search of the shed. The sequence of events Morlock described was confirmed in part by the canine officer's testimony that he waited for Morlock's instructions before conducting an investigation of the truck or shed and by

[3]In one motion in limine filed below, Medina argued the "search of his person" violated the Fourth Amendment and article II, § 8 of the Arizona Constitution. In that motion, Medina asserted the detective had reached in his pocket and removed his cellular telephone, wallet, cash, and drug ledger before Medina had been placed under arrest and prior to the search warrant for the premises being issued. He did not argue below that the officers had searched the premises prior to obtaining consent. And at the hearing on Medina's motion, his counsel stated: "We agree, Judge, that based on what's been presented, there's been consent to search, but now I'm going a step further regarding probable cause to arrest my client."

another detective's testimony that Morlock was the lead investigator at the scene and was in charge of directing the other officers. And contrary to Medina's argument, nothing in Ballesteros's testimony at the hearing demonstrates that his search of the shed preceded the consent to search. Thus, there was no error, let alone fundamental error.

Admission of Drug Ledger

¶14 Medina also argues "[t]he admission of the [drug] 'ledger,' and subsequent limiting instruction[,] created constitutional error, denying [him] a fair trial [and] requiring this court to vacate [his] convictions." He contends the ledger was erroneously admitted because it "contained information of prior bad acts," and also because the trial court's limiting instruction "actually misled the jury, and may have caused them to return a verdict on improper grounds." We review evidentiary rulings for an abuse of discretion. *State v. Lehr*, 227 Ariz. 140, ¶ 36, 254 P.3d 379, 388 (2011). "A ruling is an abuse of discretion when 'the reasons given by the court . . . are clearly untenable, legally incorrect, or amount to a denial of justice.'" *State v. Herrera*, 226 Ariz. 59, ¶ 10, 243 P.3d 1041, 1045 (App. 2010), *quoting State v. Chapple*, 135 Ariz. 281, n.18, 660 P.2d 1208, 1224 n.18 (1983) (alteration in *Herrera*).

¶15 We agree with the trial court that the drug ledger was both relevant and admissible for the limited purpose of showing the defendant's knowledge of marijuana on the premises. Medina correctly points out that knowledge of the marijuana was not necessarily inconsistent with his "mere presence" defense. *See State v. Noriega*, 187 Ariz. 282, 284-86, 928 P.2d 706, 708-10 (App. 1996). But his knowledge of the marijuana was a "fact . . . of consequence to the determination of the action" even if it

was not dispositive. Ariz. R. Evid. 401; *see also* § 13-3405(A) (knowledge an element of possession for sale). And Medina's possession of the ledger made it "more probable" that he knew of the marijuana on the premises. Ariz. R. Evid. 401; *see United States v. Robertson*, 15 F.3d 862, 872 (9th Cir. 1994) (ledger relevant to establish drug trafficking charges), *judgment reversed on other grounds*, 514 U.S. 669 (1995); *United States v. Jaramillo-Suarez*, 950 F.2d 1378, 1383 (9th Cir. 1991) (pay/owe sheets admissible to show character and use of place where found); *see also United States v. Mejia*, 600 F.3d 12, 19 (1st Cir.), *cert. denied*, ___ U.S. ___, 131 S. Ct. 184 (2010) (drug ledgers admissible over Rule 404(b) and other objections and highly probative given mere presence defense).

¶16 Medina further argues that even if relevant, the drug ledger should have been excluded under Rule 403, Ariz. R. Evid., because its probative value was substantially outweighed by the danger of unfair prejudice. We disagree. The ledger was highly probative given Medina's mere presence defense—because it tended to establish his knowledge of the marijuana. And any prejudice he may have suffered did not substantially outweigh that probative value, nor can we say that such prejudice was "unfair." *See State v. Gulbrandson*, 184 Ariz. 46, 61, 906 P.2d 579, 594 (1995) ("Evidence is unfairly prejudicial only when it has an undue tendency to suggest a decision on an improper basis such as emotion, sympathy, or horror.").

¶17 Additionally, the parties dispute whether the drug ledger even constituted Rule 404(b), other-act evidence. Although some of the details regarding the ledger were mentioned at trial, the state never suggested the ledger represented other acts or prior acts

Medina had committed. *See Jaramillo-Suarez*, 950 F.2d at 1384 (rejecting defendant's other-acts argument "for several reasons" including lack of evidence suggesting document represented prior bad acts). In any event, even assuming the drug ledger constituted other-act evidence, as discussed above, it would have been admissible as an exception under Rule 404(b) to show "proof of . . . knowledge . . . or absence of mistake or accident." Ariz. R. Evid. 404(b). We find no abuse of discretion.

¶18 Finally, Medina maintains the trial court's limiting instruction on the jury's use of the ledger "actually misled the jury, and may have caused them to return a verdict on improper grounds." He argues the instruction was "confusing, and . . . implie[d] that if [Medina] was aware others in the house were engaging in illegal activity, that [he] must be guilty as well." We review de novo whether jury instructions accurately state the law. *State v. Fierro*, 220 Ariz. 337, ¶ 4, 206 P.3d 786, 787 (App. 2008). "In making this determination, we consider the instructions in their entirety 'to ensure that the jury receive[d] the information it need[ed] to arrive at a legally correct decision.'" *Id.*, *quoting State ex rel. Thomas v. Granville*, 211 Ariz. 468, ¶ 8, 123 P.3d 662, 665 (2005) (alterations in *Fierro*).

¶19 Here, the trial court gave the following instruction:

> Document found in defendant's wallet:
>
> You have heard evidence concerning State's Exhibit 20, a document found in the defendant's wallet. You are to consider that document and its context [sic] when determining whether the defendant was merely present at the location where the marijuana was located or whether he had knowledge of the marijuana. You may not consider Exhibit

> 20 for any other purpose, including as evidence of the character of the defendant.

At trial, Medina did not object to the instruction on the grounds that it was "confusing" or misstated the law before the court gave it. And when asked by the court if he would like any changes to the instruction, Medina's counsel replied "[n]o. Just the same objection." Rule 21.3(c), Ariz. R. Crim. P., provides in pertinent part:

> No party may assign as error on appeal the court's giving or failing to give any instruction or portion thereof . . . unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which the party objects and the grounds of his or her objection.

Thus, Medina has waived any assignment of error as to the instruction because he failed to comply with Rule 21.3(c) by "stating distinctly the matter to which [he] object[ed]." *Id*.

¶20 However, even if Medina's cursory statement referring to his previous objection to the admission of the ledger could be construed as an objection to the instruction, we conclude the jury instructions as a whole accurately stated the law and provided the jury with the information necessary for it to reach a legally correct conclusion. *See Fierro*, 220 Ariz. 337, ¶ 4, 206 P.3d at 787. To the extent the jury potentially could have been confused by the court's limiting instruction, such confusion was cured by the instructions regarding the elements of the crimes, burden of proof, and mere-presence defense. We find no reversible error.

Disposition

¶21 For the reasons set forth above, Medina's convictions are affirmed.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge