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See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2009-0020
	)	DEPARTMENT A
Appellee,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
CHRISTOPHER WAYNE FRANCIS,	)	the Supreme Court
	)	
Appellant.	)	
_____	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20073878

Honorable Howard Hantman, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General  
By Kent E. Cattani and Amy M. Thorson

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K E L L Y, Judge.

¶1 After a jury trial, Christopher Francis was convicted of multiple felony charges related to his involvement in marijuana trafficking. The trial court sentenced him

to a combination of concurrent and consecutive prison terms totaling fourteen years. On appeal, he contends the court erred in denying his motions for a mistrial based on the prosecutor's use of peremptory jury strikes and in permitting references to his refusal to consent to a search. He also maintains the evidence was insufficient to prove he possessed a weapon during the commission of a felony drug offense.<sup>1</sup> We affirm.

### **Background**

¶2 “We view the facts and all reasonable inferences therefrom in the light most favorable to upholding the verdicts.” *See State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999). In September 2006, a police officer observing suspected drug transportation activity saw appellant Francis and his codefendant Monica Guzman enter a house on Calle Lado Al Rio in Tucson. Francis and Guzman left shortly thereafter in one car, following a second car driven by codefendant Rohan Butler. Officers followed Butler to a house on Camino Laguna Seca and conducted a “knock and talk” investigation.

¶3 When Butler answered the door, he was talking on several cellular telephones. He told the officers he was visiting the house and his friend “Michael” lived there. While talking to officers, Butler answered a call and told them the caller said the police did not have a warrant and Butler could not let them in the house. At the same time, other officers found two bales of marijuana behind the back wall of the house and saw footprints leading from the back door to the bales.

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<sup>1</sup>In a separate, contemporaneously filed, published opinion, we address another issue that meets the requirements for publication. *See Ariz. R. Sup. Ct. 111(b), (h)*; *see also Ariz. R. Crim. P. 31.26* (providing for partial publication of decision).

¶4 After officers obtained warrants to search both houses, they first searched the Laguna Seca house and found documents bearing Francis's name, photographs of Francis and Guzman, letters addressed to individuals at the Calle Lado Al Rio address, marijuana, ledgers, a digital scale, and packing materials. In the master bedroom, they found a drug ledger and shipping receipts in Francis's handwriting, with the Calle Lado Al Rio address. They also found \$12,940 in cash and two handguns in the master bedroom closet.

¶5 When officers searched the house on Calle Lado Al Rio, they found it unoccupied and sparsely furnished. In it they found a pistol, wooden crates, shipping boxes, a fifty-pound digital scale, marijuana, some ledgers, and a piece of cardboard with Francis's handwriting on it. Francis was indicted, and a warrant issued for his arrest.

¶6 In April 2007, while these charges were pending, the Drug Enforcement Administration (DEA) received an unrelated tip from a local trucking company about a suspicious shipment. An undercover agent accompanied a trucking company employee to a house on Placita Brisa Grande in Tucson to pick up several shipping crates suspected to contain drugs. The crates contained approximately 1,200 pounds of marijuana. Officers saw codefendant Mark Prehay meet the truck, oversee its loading, and leave in a car with Francis shortly after the truck left. Agents later found trucking company receipts, drug ledgers, packaging materials, air fresheners, and a gun inside this house. Based on the shipping dates on various receipts found at the three residences, mostly in Francis's handwriting, the state learned when other shipments of marijuana had been

made. One receipt listed a shipment of 310 pounds from the same address, which DEA agents in Pennsylvania had intercepted and found to contain 310 pounds of marijuana.

¶7 The state obtained a second indictment encompassing both the charges from the first indictment and new transportation charges alleged after the April 2007 incident.<sup>2</sup> The state charged Francis with thirteen felony counts, including one count of conspiracy to commit possession and/or transportation of marijuana for sale, one count of possession of a deadly weapon during the commission of a felony drug offense, one count of possession of marijuana for sale, and ten counts of transportation of marijuana for sale.

¶8 After a twelve-day trial, the jury found Francis guilty of all counts except three counts of transporting marijuana for sale.<sup>3</sup> The trial court imposed a combination of consecutive and concurrent, presumptive sentences totaling fourteen years' imprisonment. This appeal followed.

## **Discussion**

### ***Batson Challenge***

¶9 Francis first contends the prosecutor violated his right to equal protection by striking minority jurors from the panel. The Equal Protection Clause of the Fourteenth Amendment prohibits a peremptory strike against a juror based solely on race

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<sup>2</sup>The trial court later dismissed the earlier case as to Francis because the indictment for the current case included those charges.

<sup>3</sup>At the close of the state's case, the court granted the state's motion to dismiss one of the transportation charges and it declared a mistrial as to two other transportation counts for which the jury had been unable to reach a verdict.

or ethnicity. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986); *State v. Purcell*, 199 Ariz. 319, ¶ 22, 18 P.3d 113, 119 (App. 2001). When reviewing a trial court’s ruling on a *Batson* challenge, we review de novo the court’s application of the law but defer to its findings of fact unless clearly erroneous. *State v. Newell*, 212 Ariz. 389, ¶ 52, 132 P.3d 833, 844-45 (2006); *State v. Lucas*, 199 Ariz. 366, ¶ 6, 18 P.3d 160, 162 (App. 2001).

¶10 A trial court’s analysis of a *Batson* challenge involves three steps. *State v. Gay*, 214 Ariz. 214, ¶ 17, 150 P.3d 787, 793 (App. 2007). First, the party challenging the strike must make a prima facie showing of discrimination based on race, gender, or some other protected characteristic. *Lucas*, 199 Ariz. 366, ¶ 7, 18 P.3d at 162. The proponent must then provide a race-neutral explanation for the strike. *Purkett v. Elem*, 514 U.S. 765, 767-68 (1995) (explanation need not be persuasive or plausible as long as facially neutral). Third, the challenging party must persuade the court that the proffered reason is pretextual. *Id.* The trial court must then determine the credibility of the proponent’s explanation and “whether the proffered rationale has some basis in accepted trial strategy.” *Gay*, 214 Ariz. 214, ¶ 17, 150 P.3d at 793, quoting *Miller-El v. Cockrell (Miller-El I)*, 537 U.S. 322, 339 (2003); *State v. Eagle*, 196 Ariz. 27, ¶ 9, 992 P.2d 1122, 1125 (App. 1998), *aff’d*, 196 Ariz. 188, 994 P.2d 395 (2000). “This third step is fact intensive and will turn on issues of credibility, which the trial court is in a better position to assess than is this Court.” *Newell*, 212 Ariz. 389, ¶ 54, 132 P.3d at 845.

¶11 Here, the prosecutor used two peremptory challenges to remove the only two African-American venirepersons, S. and W. The prosecutor explained his concern that, because S. was a residential drug counselor, she might express sympathy or “look to

inner motivations” in jury deliberations. The prosecutor noted that he struck a white juror for the same reason. The prosecutor explained he had stricken W. because she had shown “discontent and disapproval” of the manner in which he was asking questions, had been the only juror making eye contact with the judge when the court was sustaining objections, and had been looking at the judge while the prosecutor was conducting his questioning.

¶12 In response to the prosecutor’s explanations, the trial court stated: “There’s no *Batson* violation. The strikes were race neutral.” Francis claims, however, the prosecutor’s explanation that juror W. had a negative attitude was contrived because her attitude was due to the prosecutor’s own conduct in singling her out for extra questions. He argues the prosecutor’s proffered explanations were not genuine and the trial court unreasonably accepted them as not racially motivated. But, “determining the validity of those explanations required the court to evaluate the sincerity of the prosecutor as well as the behavior of the juror[.]. These are credibility determinations that the court was in the best position to make.” *Gay*, 214 Ariz. 214, ¶ 19, 150 P.3d at 794.

¶13 Francis also argues the prosecutor’s strike of the only two African-American panel members shows a pattern that may raise an inference of discrimination. *Batson*, 476 U.S. at 96-97. But he concedes the prosecutor “arguably had a legitimate reason” to strike S. and does not directly challenge that strike on appeal. Striking the second African-American juror does not necessarily show a pattern of discrimination. *See Fernandez v. Roe*, 286 F.3d 1073, 1078 (9th Cir. 2002) (two challenges out of two venirepersons in a particular group are not always enough to establish a prima facie case

under *Batson*). We are not persuaded the trial court clearly erred in finding the state's explanations race-neutral. See *State v. Hernandez*, 170 Ariz. 301, 305, 823 P.2d 1309, 1313 (App. 1991) ("It is permissible to rely on a prospective juror's mode of answering questions as a basis for peremptory selections.").

### **Commentary on Invocation of Fourth Amendment Rights**

¶14 At trial, Francis moved for a mistrial based on statements made by a codefendant's counsel and by the prosecutor. He contends references to his refusal to consent to a search violated his due process right to a fair trial and require reversal of his convictions.

¶15 In a brief opening statement to the jury panel, codefendant Butler's attorney told the jurors it had been Francis on the telephone telling Butler not to allow the officers to search the home. Francis objected to the comment and suggested the court should strike the panel. The trial court denied the request.

¶16 In the state's opening statement, the prosecutor referred to Butler's attorney's comment and told the jurors Butler had been on the telephone with Francis, who was "the person in control of this property and whether or not the police can come in." He also stated that it was Francis's right to refuse a search in the absence of a warrant and that he "mention[ed] this only to show the person who is in control of this decision . . . was . . . Francis." After the prosecutor's opening statement, Francis moved for a mistrial, arguing the prosecutor's reference to Butler's call was akin to an improper reference to a defendant's invocation of the right to remain silent. The trial court denied the motion.

¶17 Francis again moved for mistrial when the court was considering whether the recording and transcript of the “knock and talk” would be admitted at trial. Francis had no objection to the admission of the recording and transcript but objected to the prosecutor’s claim that Francis had been directing Butler to refuse to give permission to search. He argued it was impermissible for the state to claim that Francis had been the caller and had refused the search, citing *State v. Palenkas*, 188 Ariz. 201, 933 P.2d 1269 (App. 1996); *State ex rel. Verburg v. Jones*, 211 Ariz. 413, 121 P.3d 1283 (App. 2005), and other authority. The trial court denied Francis’s request to preclude the state from suggesting it had been Francis on the telephone with Butler.

¶18 The prosecutor did not directly discuss Francis’s refusal again but mentioned in his closing argument that the codefendant had been talking on the telephone to a person who had refused the officer’s request to search the house. The prosecutor told the jury: “People in America have a right to tell the police, no, you can’t search. You should draw, and the Court, I’m sure, will advise you, you should infer nothing bad in terms of guilt[] by people saying, no, you need a warrant. That’s what the Constitution requires.” He then argued the significance was that Francis was in control of the property. Francis did not object to these statements.

¶19 “The extent to which counsel can go in opening statement is within the discretion of the court.” *State v. Islas*, 119 Ariz. 559, 561, 582 P.2d 649, 651 (App. 1978). We review a trial court’s ruling on an objection during opening argument for an abuse of discretion. *State v. Prewitt*, 104 Ariz. 326, 333, 452 P.2d 500, 507 (1969). Likewise, prosecutors are given “wide latitude in presenting their closing arguments to

the jury.” *State v. Jones*, 197 Ariz. 290, ¶ 37, 4 P.3d 345, 360 (2000). “Although counsel may not comment on matters not in evidence before the jury, they may argue reasonable inferences from the evidence presented at trial.” *State v. Blackman*, 201 Ariz. 527, ¶ 71, 38 P.3d 1192, 1209 (App. 2002).

¶20 “The [Fourth] Amendment gives [a defendant] a constitutional right to refuse to consent to entry and search. His asserting it cannot be a crime. Nor can it be evidence of a crime.” *United States v. Prescott*, 581 F.2d 1343, 1351 (9th Cir. 1978) (citations omitted). It is “generally impermissible to use a defendant’s invocation of Fourth Amendment protections against him.” *State v. Wilson*, 185 Ariz. 254, 258, 914 P.2d 1346, 1350 (App. 1996); *see also Palenkas*, 188 Ariz. at 212, 933 P.2d at 1280.

¶21 The state maintains, however, that the prosecutor’s comments are impermissible only if the state’s purpose was to imply that the defendant’s refusal was evidence of his guilt. It argues the comments asked the jurors to draw a permissible inference from the evidence of the caller’s refusal of a search—that Francis had dominion and control over the Laguna Seca house. *United States v. Dozal*, 173 F.3d 787, 794 (10th Cir. 1999) (evidence of refusal to search introduced for “proper purpose of establishing dominion and control over the premises”). This case is distinguishable from *Palenkas*, in which the prosecutor argued: “Good people help the police . . . [t]hey don’t frustrate the police by requiring them to get a search warrant to find evidence of a crime.” 188 Ariz. at 212, 933 P.2d at 1280. In that case, the prosecutor’s references to the defendant’s refusal to consent to a warrantless search were both in violation of the trial court’s order and purposefully created “an inference that defendant’s invocation of constitutional rights

was evidence of his guilt.” *Id.* But, “a reference to a defendant’s refusal to consent to a warrantless search may be admissible for purposes other than to support an inference of guilt.” *United States v. Runyan*, 290 F.3d 223, 250 n.18 (5th Cir. 2002); *Dozal*, 173 F.3d at 794.

¶22 Here, the recording and transcript of the “knock and talk” were admitted without objection by Francis who objected only to the inference he was the caller who had directed Butler to refuse a search of the home. Thus, the evidence that someone had refused a search of the house was properly before the jury. Francis objected only to the propriety of argument by counsel as to the inferences that could be drawn from that evidence. “[A]sking a jury to draw adverse inferences from such a refusal may be impermissible if the testimony is not admitted as a fair response to a claim by the defendant or for some other proper purpose.” *Dozal*, 173 F.3d at 794. In this case, however, Francis claimed to have no connection to the house, and we are persuaded, therefore, that the prosecutor’s statements were permissible “for the proper purpose of establishing [Francis’s] dominion and control over the premises.” *Id.*

¶23 Moreover, there was ample evidence from which the jury could infer that Francis was the person who had called Butler on a cellular telephone just as the officers initiated the “knock and talk” with Butler. Officers had been continuously surveilling Butler’s movements since he had arrived at the Calle Al Lado Rio house a few hours earlier. They had seen him pull a burgundy vehicle into the garage at Calle Al Lado Rio, shut the door, open it shortly thereafter and pull the Burgundy vehicle out onto the street. They had seen a black vehicle driven by an unidentified male pull into the garage and the

door shut. They had seen that Butler and the unidentified male had remained inside together and that Francis and Guzman arrived at the house at the same time in a white vehicle. Officers had seen that when the black vehicle left the garage, Butler immediately drove the burgundy vehicle back into the garage and shut the door. Within minutes, Butler had driven the burgundy vehicle out of the garage onto the street, followed closely by Francis and Guzman in the white vehicle.

¶24 Officers followed both vehicles and observed that they had traveled close together, staying in the same lane and changing lanes at the same time. At one point, Francis's vehicle briefly had pulled into a parking lot, a maneuver described as "counter surveillance" intended to reveal whether the vehicles were being followed. Officers observed that both Francis and Butler had used cellular telephones as they drove.

¶25 After Butler had pulled into the garage at the Laguna Seca house, an officer "locked eyes" with Francis while he was driving past the Laguna Seca house, continuing to use a cellular telephone. The officer had then moved to the opposite end of the street where he again saw Francis looking in his direction when Francis had passed by for the second time. Francis had then left the area.

¶26 When Butler had answered the door after a short delay, he was holding three cellular telephones, having a conversation on one, and answering a call on another. The caller purportedly had told Butler that the officers could not search without a warrant. Since Francis had twice made eye contact with an officer on the street outside the house, a jury could reasonably infer that Francis suspected police surveillance, that Butler had telephoned Francis when officers knocked on the door, and that Francis was

directing Butler to refuse a warrantless search. Thus, because it was supported by the evidence and permissible under the law, the trial court did not err in allowing the prosecutor, in his opening statement and closing argument, to urge the inference that Francis had been the caller who directed Butler to refuse a warrantless search, and that Francis had been in control of the Laguna Seca house.

### **Possession of a Weapon While Committing a Felony Drug Offense**

¶27 Francis next argues the evidence was insufficient to prove he had possessed a firearm during the commission of a felony drug offense and the count should have been dismissed under Rule 20(a), Ariz. R. Crim. P. We review claims of insufficient evidence *de novo*. *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993).

¶28 Rule 20 provides that “the court shall enter a judgment of acquittal of one or more offenses charged in an indictment, information or complaint after the evidence on either side is closed, if there is no substantial evidence to warrant a conviction.” Reversible error based on insufficiency of the evidence occurs only if there is a complete absence of “substantial evidence” to support the conviction. *State v. Sullivan*, 187 Ariz. 599, 603, 931 P.2d 1109, 1113 (App. 1996). “Substantial evidence is more than a mere scintilla and 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. Di Giulio*, 172 Ariz. 156, 159, 835 P.2d 488, 491 (App. 1992), quoting *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990). In reviewing claims of insufficient evidence, we examine the evidence in the light most favorable to sustaining the verdicts and resolve all reasonable inferences against the defendant. *State v. Rienhardt*, 190 Ariz.

579, 588-89, 951 P.2d 454, 463-64 (1997). We will reverse only if there is a complete absence of probative facts supporting the conviction. *State v. Scott*, 113 Ariz. 423, 424-25, 555 P.2d 1117, 1118-19 (1976); *see also State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987) (“[I]t must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury.”).

¶29 To prove misconduct involving weapons, the state must show the defendant knowingly used or possessed a deadly weapon during the commission of a felony offense. *See* A.R.S. § 13-3102(A)(8). The “spatial proximity and accessibility of the weapon to the defendant and to the site of the drug offense” are factors in determining whether a nexus exists. *State v. Petrak*, 198 Ariz. 260, ¶ 19, 8 P.3d 1174, 1180 (App. 2000). “The state must prove that the defendant intended to use or could have used the weapon to further the felony drug offense underlying the weapons misconduct charge.” *Id.*

¶30 Francis concedes the firearms “had a spatial and temporal nexus to the location of the drug offenses because they were found in houses where marijuana was being stored and shipped.” But Francis argues there was “no spatial proximity between him and the three firearms” because, although “they were in places where they arguably could be used to protect assets of the marijuana shipment business, . . . [his] connection with the residences was minimal.” Although he admits his “role in the enterprise was to act as a manager and to supervise shipments,” he argues that he “intentionally distanced himself from the contraband,” that his role was not to guard or protect anything, and that there was no evidence he knew there were guns in the houses. Francis argues the state

did not prove the personal belongings in the bedroom where the guns were found were his.

¶31 Francis also argues there was no evidence he owned or rented the house, and his name was not on the utility bills. However, viewing the evidence, as we must, in the light most favorable to sustaining the convictions, the documents and objects found in the houses were sufficient evidence from which a jury could find the weapons were accessible to Francis for use in a drug offense. In the same bedroom of the Laguna Seca house where two handguns were found, police found court papers, vehicle rental documents, and photographs connecting Francis to the house; shipping receipts in Francis's handwriting that listed the Lado Al Rio address; and approximately \$13,000 in cash.

¶32 At the Lado Al Rio residence that Francis had been seen entering and leaving, officers also found a pistol, a scale, drug paraphernalia, ledgers, and marijuana. And a piece of cardboard found in the garage had Francis's handwriting on it.

¶33 We agree with the state that "[r]easonable jurors could conclude from this evidence that [Francis] was connected to the drug activity at the two houses and that he had intended to use or could have used the weapons to further commission of the felony drug offenses." Francis acknowledges that, even under *Petrak*, 198 Ariz. 260, ¶ 11, 8 P.3d at 1178, possession under the weapons misconduct statute may be actual or constructive, and the jury was instructed on both actual possession and constructive possession. On this record, the jury could reasonably find Francis guilty of knowingly

possessing the drugs and weapons found in both houses. Accordingly, the trial court did not err in denying the motion for judgment of acquittal.

### Disposition

¶34 For the foregoing reasons, as well as those set out in our separate opinion, we affirm Francis's convictions and sentence.

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

CONCURRING:

/s/ Joseph W. Howard  
JOSEPH W. HOWARD, Chief Judge

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