DIVISION ONE
FILED: 05/07/2013
RUTH A. WILLINGHAM, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 12-0283
	)	
Appellee,	)	DEPARTMENT E
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
JOHN KRISTOFFER LARSGARD,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	
	)	

Appeal from the Superior Court in Navajo County

Cause Nos. S0900CR201100767 and S0900CR201100780

The Honorable John N. Lamb, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
by Joseph T. Maziarz, Chief Counsel,
Criminal Appeals Section
and Michael T. O'Toole, Assistant Attorney General
Attorneys for Appellee

Criss E. Candelaria — Pinetop
Attorney for Appellant

H A L L, Judge

¶1 Following a jury trial, John Larsgard was convicted of six counts of aggravated assault[1] and one count of felony endangerment for driving into crowds of people celebrating Winslow's annual "Standing on the Corner" festival. Larsgard filed a timely notice of appeal, and we have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(2) (2003), 13-4031, and -4033(A) (2010). For the reasons that follow, we find no reversible error and affirm.

Due Process Claim Regarding Medications

¶2 Larsgard's first argument on appeal alleges a due process violation. He claims that he was denied pain medications prescribed by his doctor in Norway for severe neck pain and was provided inadequate medication by jail medical staff that "severely impacted his ability to communicate with counsel, prevented him from reacting rapidly to trial developments, sedated him, and diminished his ability to express emotions."[2]

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[1] The aggravated assault counts alleged that Larsgard intentionally placed the victims in apprehension of imminent physical injury while using a deadly weapon or dangerous instrument.

[2] Although Larsgard mentions in the caption to this argument that his due process rights were also violated by denial of access to legal materials, he has waived and abandoned this claim on appeal by failing to make any argument or offer any authority in support of it. *See State v. Moody,* 208 Ariz. 424, 452 n.9, ¶ 101, 94 P.3d 1119, 1147 n.9 (2004) (failure to present "significant arguments, supported by authority" in

¶3 On the first day of trial, Larsgard filed a motion asking the court to order the Navajo County Jail to administer the pain medications that had been prescribed by his treating doctor in Norway for chronic pain because the medication provided to him by jail medical staff the previous five months left him in "constant pain." The trial court denied the motion, reasoning that it did not make sense the day before trial to change the medications Larsgard had been on for months and that it was not in a position to determine the correct medications "without having some guidance."

¶4 Larsgard renewed his request two days later when he read an e-mail from his doctor in Norway explaining that Larsgard had been prescribed unusually high dosages of opioids, including oxycodone, to allow him to participate in the activities of daily life. The court advised Larsgard to forward the e-mail to the jail "and let them do what they need to do." Larsgard did not pursue the matter further until he again raised the issue in a motion for new trial. The court denied the motion for new trial, finding that "Mr. Larsgard was engaged fully in the trial of his case, taking notes, whispering with investigators, testifying lucidly and clearly and confronting [sic] with counsel, and he did not appear tired or out of it."

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opening brief waives issue) (citing *State v. Carver,* 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989)).

¶5 During sentencing, Larsgard testified that he was distracted at trial by the pain, twice felt he was about to fall asleep because of difficulty in sleeping at night, and "was not able to reach my full potential as far as focus." He acknowledged, however, that he was able to hear all of the witnesses testify, and to answer questions when he testified. He testified that he "could have done better" if he had different medication, but he did not give any specific examples.

¶6 We do not perceive a due process violation that would require Larsgard's convictions and sentences to be vacated. The record fails to support his claims that: (1) he was forced to take the medications given him by the jail medical staff; (2) that the medications "made him restless, cloudy, unresponsive, nauseous, and largely apathetic toward life;" or (3) the medications "severely impacted his ability to communicate with counsel, prevented him from reacting rapidly to trial developments, sedated him, and diminished his ability to express emotions." Moreover, the cases that Larsgard relies on pertain to standards for the forcible administration of anti-psychotic drugs, *see Sell v. United States*, 539 U.S. 166, 169 (2003); *Riggins v. Nevada*, 504 U.S. 127, 129 (1992); *Washington v. Harper*, 494 U.S. 210, 213 (1990); *United States v. Loughner*, 672

F.3d 731, 744-52 (9th Cir. 2012), and are therefore inapposite here because Larsgard was not forced to take any medication.[3]

¶7 In summary, Larsgard has failed to present evidence demonstrating that the unidentified medications that the jail medical staff provided him significantly affected his access to counsel or his ability to participate in his own defense. The trial court had the opportunity to observe Larsgard throughout the trial, and found that he was fully engaged in the trial and was able to and did communicate with counsel. The trial court's observations are entitled to substantial deference, *see State v. Moody*, 208 Ariz. 424, 443, ¶ 48, 94 P.3d 119, 1138 (2004) (addressing whether reasonable grounds exist for competency hearing), and we find no error that requires setting aside the convictions and sentences and ordering a new trial.

[3] Our research has not disclosed, and Larsgard has not cited, any authority for the proposition that due process requires a trial court to ensure that a criminal defendant be given the same drugs he was prescribed prior to his detention. The sole case that Larsgard cites for this proposition, *Gibson v. County of Washoe*, 290 F.3d 1175 (9th Cir. 2002), holds only that a pretrial detainee's due process rights are violated by deliberate indifference to his serious medical needs. *See id.* at 1187-97 (finding that fact issue existed as to whether county was liable for civil rights claim based on lack of policy requiring medical staff to use information from prescription medication to screen incoming detainees, in light of other policy delaying medical evaluations of incoming detainees who are combative and uncooperative).

Claims of Late Disclosure and *Brady* violations

1. Late Disclosure

¶8 Larsgard argues that the trial court abused its discretion in failing to preclude an untimely disclosed lab report showing the presence of drugs in his system a short time after the incident.

¶9 We review a trial court's imposition of sanctions for discovery violations for abuse of discretion. *State v. Lee*, 185 Ariz. 549, 555-56, 917 P.2d 692, 698-99 (1996). A court may impose any remedy or sanction for nondisclosure that it finds appropriate. Ariz. R. Crim. P. 15.7(a). "Preclusion is a sanction of last resort, to be imposed only if other less stringent sanctions are not applicable." *Moody*, 208 Ariz. at 454, ¶ 114, 94 P.3d at 1149 (citations and internal punctuation omitted). Instead of precluding the late-disclosed lab report, the court continued the trial to allow defendant additional time to prepare. The State had timely disclosed that it was waiting for the lab results, and the disclosure was not a surprise to Larsgard when he received them shortly before trial. The results were also important to the State's case because they demonstrated that oxycodone and three types of muscle relaxants were present in Larsgard's bloodstream, thereby providing a possible explanation for his aggressive driving during the incident. Moreover, the State disclosed the report the same day

it was received, and Larsgard did not claim that the prosecutor acted in bad faith. Under these circumstances, we cannot say that the trial court abused its discretion.

2. *Brady* Violations

¶10 Larsgard also claims that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to produce a videotape of his booking and failing to disclose that two of the State's witnesses had filed suit against the company that supplied Larsgard with the rental car.

¶11 In *Brady,* the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *United States v. Agurs,* 427 U.S. 97, 109-10 (1976). Evidence is considered "material" for purposes of *Brady* only if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

¶12 The issue of a possible "booking tape" first arose during the cross-examination of Winslow Police Officer Alicia Marquez, who had testified on direct examination that when Larsgard was in a holding cell after his arrest, he fluctuated between being "real calm" and "irate or aggressive," and he agreed only to make a written statement about the incident. Officer Marquez acknowledged that there were security cameras "in the location where Mr. Larsgard was being detained." Larsgard argued following this witness's testimony and in a motion for new trial that the prosecutor should have searched for and disclosed the booking tape. The issue of the civil lawsuits purportedly filed by two of the witnesses against the rental-car company first surfaced in defendant's post-trial motion for a directed verdict and motion for a new trial, when Larsgard argued that the prosecutor should have obtained and disclosed this information.

¶13 Because Larsgard failed to raise a claim during trial that the State's failure to disclose the booking tape or the civil lawsuits violated his *Brady* rights, we review only for fundamental error. *Henderson,* 210 Ariz. 561, 568, ¶ 22, 115 P.3d 601, 608. Larsgard thus bears the burden of establishing that there was error, that the error was fundamental, and that the error caused him prejudice. *Id*. at 568, ¶¶ 23, 26, 115 P.3d at 608.

¶14 Larsgard has failed to meet his burden. First, he has failed to demonstrate the existence of a "booking tape" that would have clearly shown his demeanor or captured his remark that he would make only a written statement. The evidence did not show that the security camera was focused on Larsgard, that it was turned on, or that the tape was retained after that night. Second, he has failed to demonstrate that, had the booking tape shown his demeanor or captured his remarks, the evidence would have contradicted the officer's testimony. Finally, he has failed to demonstrate a reasonable probability that, even if the tape had contradicted this officer's testimony, the result of his trial would have been any different. On this record, we find that Larsgard has failed to demonstrate a *Brady* violation with respect to the booking tape.

¶15 Larsgard has likewise failed to establish that the non-disclosure of the civil lawsuits filed by the two witnesses constituted a *Brady* violation. The State's duty under *Brady* extends only to evidence in its possession or the possession of police investigating or assisting in the prosecution of the crime. *See Strickler v. Greene*, 527 U.S. 263, 280-81 (1999). *Brady*, moreover, only imposes an obligation on a prosecutor "to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley,* 514 U.S. 419, 437 (1995). The record in this

case fails to show that either police or the prosecutor knew that the two witnesses had filed suit against the rental-car company, when these witnesses purportedly filed these lawsuits,[4] or why Larsgard could not have discovered this information himself. Moreover, it is hardly surprising that the witnesses, both of whom were injured during the incident, would have filed lawsuits. Under these circumstances, Larsgard has failed to demonstrate any reasonable probability that the outcome of his trial would have been any different had evidence that these two witnesses had in fact filed lawsuits been presented to the jury. On this record, we find no error, let alone fundamental error.

Weight of the Evidence

¶16 Larsgard also claims that the trial court erred in denying his motion for a new trial on the ground that the verdict was contrary to the weight of the evidence. He argues that the eyewitnesses "were themselves the victims of misperceptions," because the physical evidence and his own conduct after the first incident showed that he had not deliberately driven into the crowd. We review the trial court's denial of a motion for new trial based on the weight of the evidence for abuse of discretion. *State v. Spears*, 184 Ariz.

[4] Indeed, Larsgard did not include a citation to the record that supports his contention that the witnesses had filed lawsuits against the rental-car company.

277, 289, 908 P.2d 1062, 1074 (1996). The trial court did not abuse its discretion here.

¶17 Larsgard was charged with eight counts of aggravated assault for using a dangerous instrument, a vehicle, to intentionally place each of the named victims in reasonable apprehension of imminent physical injury. The jury convicted him of six counts and acquitted him of the two remaining counts. Larsgard was also charged with recklessly endangering a two-year-old boy, with a substantial risk of imminent death, and the jury convicted him of this offense.

¶18 We view the evidence in the light most favorable to sustaining the convictions and leave credibility determinations to the judge, who was present and in the best position to evaluate credibility. Larsgard's convictions were supported by sufficient evidence of record, and we cannot say that the trial court abused its discretion in denying the motion for new trial.[5]

[5] Larsgard also argues that the trial court abused its discretion in denying his request to depose his mother, a Norway resident, before a trial date had been set. Although the court denied the request, his mother testified at trial. Consequently, the issue is moot, and we decline to address it. *See State v. Hoskins,* 199 Ariz. 127, 136-37, ¶¶ 22-24, 14 P.3d 997, 1006-07 (2000) (concluding that defendant's claim that his *Miranda* rights were violated was moot because his statement was not introduced at trial).

Conclusion

¶19 For the foregoing reasons, we affirm Larsgard's convictions and sentences.

_____/s/_____
PHILIP HALL, Judge

CONCURRING:

_____/s/_____
MARGARET H. DOWNIE, Presiding Judge

_____/s/_____
MAURICE PORTLEY, Judge