DIVISION ONE
FILED: 09/02/2010
RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 09-0259
	)	
Appellee,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
	)	Rule 111, Rules of the
MARTIN SARMIENTO ADRIAN,	)	Arizona Supreme Court)
	)	
Appellant.	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR 2008-152002-001 DT

The Honorable Lisa M. Roberts, Judge Pro Tempore

AFFIRMED

Terry Goddard, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Robert A. Walsh, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
by Cory Engle, Deputy Public Defender
Attorneys for Appellant

S W A N N, Judge

¶1 Martin Sarmiento Adrian appeals his convictions and sentences for possession of marijuana, possession of drug paraphernalia, and misconduct involving weapons. He argues that the trial court committed reversible error by: (1) admitting into evidence his statement to law enforcement; (2) failing to sanction *Brady* and discovery violations; and (3) finding that the evidence at trial and at sentencing was sufficient to prove his prior felony convictions. For the reasons that follow, we find no reversible error and affirm.

FACTS AND PROCEDURAL HISTORY

¶2 The evidence at trial[1] demonstrated that police and probation officers arrested Adrian at a home in west Phoenix on unidentified charges. Adrian was the only person in the house at the time. He was in his underwear, and told the officers that he had been taking a shower. After the officers conducted a protective sweep of the house, one of the probation officers asked Adrian which room he slept in so that they could search his personal belongings. Adrian pointed in the direction of the northwest bedroom and said that was where he slept.

¶3 In a search of the bedroom, police discovered a rifle in plain view, two loaded revolvers under the mattress, marijuana in various locations, and pipes and digital scales

[1] We view the evidence in the light most favorable to upholding the jury's verdicts. *State v. Moody*, 208 Ariz. 424, 435 n.1, ¶ 2, 94 P.3d 1119, 1130 n.1 (2004).

commonly used for illicit drugs in the dresser drawers. An identification card with Adrian's name and picture was found in a dresser drawer, and men's clothing in Adrian's size was found in a laundry hamper. The homeowner, Adrian's cousin, arrived at the scene and told the officers that Adrian lived in the house with her.

¶4 Adrian's probation officer testified that she had been assigned to supervise his probation from a felony conviction, and he was on probation at the time of his arrest. A fingerprint analyst testified that Adrian's fingerprints matched those in the file for the felony conviction for which he was on probation. The parties stipulated that the drug discovered in the bedroom was a usable amount of marijuana.

¶5 The homeowner testified at trial that only she and Adrian had keys to the house, and that Adrian did not live at the house but stayed overnight four or five nights a week while she was at work. Adrian would sometimes do yard work or take out the trash while she was not there. She testified that she never went into the bedroom where the contraband was found, and in fact tried to avoid that room. Adrian's godmother testified at trial that Adrian was renting a cottage behind her house at the time of his arrest, but she did not believe that he received mail at that address.

¶6 The jury convicted Adrian of possession of marijuana,

possession of drug paraphernalia, and one count of misconduct involving weapons. The jury was unable to reach a verdict on a second count of misconduct involving weapons, and the court dismissed that count without prejudice. Following a trial on prior convictions, the judge found that the State had proved seven prior felony convictions. The court enhanced the sentence based on two of the convictions, which it found were historical priors. The court sentenced Adrian to presumptive, concurrent terms, the longest of which was ten years.

¶7 Adrian timely appeals. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033(A).

DISCUSSION

I. ADMISSION OF STATEMENT

¶8 Adrian contends that the trial court reversibly erred by admitting his statement that he slept in the northwest bedroom because the statement was involuntary, obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), and its admission at trial violated the *corpus delicti* rule.

¶9 Before trial, Adrian filed a motion to suppress his statement. He argued that the statement was obtained in violation of *Miranda* because he was in custody at the time and the question of which room he slept in constituted interrogation. He argued: "The obvious intent [of the

question] was to link the contraband in the room to Mr. Adrian so that the Phoenix Police with charging authority could submit new charges." Adrian also argued that his response was involuntary. The State conceded that the officers at the scene knew that a rifle was present in the northwest bedroom before the question was asked, because they had seen it in plain view when they performed the protective sweep. The State argued, however, that a *Miranda* waiver was not required and Adrian's response was not involuntary because the probation officer's question was non-accusatory and designed simply to narrow the scope of their search to Adrian's personal property, which was permissible because Adrian was on probation.

¶10 The parties agreed that the facts were undisputed, and the trial court therefore did not hear evidence. The court denied the motion to suppress, reasoning:

> I do not believe that Miranda warnings were required here because I do not believe that this was an interrogation, nor was the question asked in a manner to elicit incriminating information. This was a situation where the probation officer had the right, in the Court's opinion, to search the Defendant's property; and in order to make sure that the search was limited, as it should be, to only the Defendant's property, the probation officer simply had to ask him, "Which room is yours?" That was not asked in order to elicit an incriminating response.

¶11 We review the trial court's ruling for abuse of discretion, *State v. Ellison*, 213 Ariz. 116, 126, ¶ 25, 140 P.3d

899, 909 (2006), and note that the inquiry into an alleged violation of *Miranda* is distinct from the inquiry into the voluntariness of the statement. *State v. Montes*, 136 Ariz. 491, 494, 667 P.2d 191, 194 (1983). Ordinarily we consider only the evidence presented at the suppression hearing, and view that evidence in the light most favorable to upholding the trial court's ruling. *Ellison,* 213 Ariz. at 126, ¶ 25, 140 P.3d at 909. In this case, however, because no evidence was presented, we rely on the undisputed facts presented in the papers.

¶12 Police are required to obtain a waiver of *Miranda* rights before conducting a custodial interrogation. *Miranda*, 384 U.S. at 444. The State concedes that Adrian was in custody at the time of the officer's question, that the question constituted interrogation, and that therefore the police were required to advise him of his *Miranda* rights before asking the question. We agree. The evidence supports a finding that Adrian was in custody at the time of the question because he was in handcuffs and under arrest. The evidence also demonstrates that the probation officer's question of which bedroom was his, when officers had just discovered contraband in plain view in one of the two bedrooms in the house, was reasonably likely to elicit incriminating information, and therefore constituted interrogation. *See Rhode Island v. Innis*, 446 U.S. 291, 301-02 (1980) ("A practice that the police should know is reasonably

likely to evoke an incriminating response from a suspect thus amounts to interrogation.").

¶13 We therefore conclude that Adrian's response was inadmissible at trial because he was not advised in advance of his *Miranda* rights. *See State v. Flores*, 201 Ariz. 239, 240-41, ¶¶ 3-5, 33 P.3d 1177, 1178-79 (App. 2001) (holding that a *Miranda* waiver was required when defendant was arrested for driving on a suspended license and arresting officer, knowing that there was a pistol in defendant's glove box, asked whether he had been convicted of a felony); *State v. Schinzel*, 202 Ariz. 375, 381, ¶ 24, 45 P.3d 1224, 1230 (App. 2002) (holding that a *Miranda* waiver is required before defendant may be questioned "about events that may lead to criminal charges even if unrelated to the offense underlying custody"); *cf. State v. Magby*, 113 Ariz. 345, 349, 353, 554 P.2d 1272, 1276, 1280 (1976) (holding that trial court erred by admitting testimony from probation officer about defendant's response to officer's un-*Mirandized* custodial interrogation about later crime, although the error was harmless in the circumstances of the case).[2]

[2] Because we find that the statement was inadmissible because it violated *Miranda*, we need not address the question of whether it was also inadmissible because it was involuntary. As the State argued below, however, no evidence suggested either police coercion or that Adrian's will was overborne, and the probation officer who asked the question testified at trial that he made no threats or promises to elicit the statement. *See State v. Boggs*, 218 Ariz. 325, 335-36, ¶ 44, 185 P.3d 111, 121-22

¶14 We agree with the State, however, that admission of Adrian's statement was harmless error in the circumstances of this case. The improper admission at trial of a defendant's statement is subject to harmless error analysis. *See State v. Gonzales*, 181 Ariz. 502, 512, 892 P.2d 838, 848 (1985). To demonstrate that an objected-to error was harmless, the State must prove beyond a reasonable doubt that the error "did not contribute to or affect the verdict or sentence." *State v. Henderson*, 210 Ariz. 561, 567, ¶ 18, 115 P.3d 601, 607 (2005). Although the State argued in closing that Adrian's statement was important in establishing that he lived at the house and slept in the bedroom where the contraband was found, the State also relied on substantial additional evidence that was at least as compelling.

¶15 Specifically, the State presented testimony that:

- The officers went to the house after talking to Adrian's mother at a different address, saw him enter the house, and, after repeated unsuccessful attempts to get him to answer the door, found that he was the only person at the house and that he was dressed in his underwear.

(2008) (a statement is voluntary when it is obtained without threat, coercion, or promises).

- Adrian had a key to the house, and the homeowner told officers at the scene that Adrian stayed at the house four or five nights a week when she was at work.
- The officers found an identification card with Adrian's name and photograph in a dresser drawer in the northwest bedroom.
- The officers found men's clothing in Adrian's size in the northwest bedroom.
- The other bedroom belonged to the homeowner.

On this record, any error in admitting Adrian's statement that it was his bedroom was harmless error.[3]

II. SANCTIONS FOR DISCOVERY VIOLATIONS

¶16 Adrian next contends that the trial court abused its discretion by denying his motions seeking sanctions for claimed discovery and *Brady* violations, specifically his motion to

[3] Adrian also argues that no evidence other than his statement showed that anyone had committed the offense of misconduct involving weapons, as necessary to satisfy the *corpus delicti* rule. Because the evidence outlined above, independent of Adrian's statement, demonstrated that he lived in the house and slept in the bedroom where a rifle was discovered in plain sight, the *corpus delicti* rule was necessarily satisfied. *See State v. Morris*, 215 Ariz. 324, 333, ¶ 34, 160 P.3d 203, 212 (2007) (The *corpus delicti* rule requires, as a condition of use of a defendant's incriminating statements to convict, that the State present evidence other than the statements sufficient to raise a reasonable inference that the "alleged injury to the victim . . . was caused by criminal conduct rather than by . . . accident." (omission in original) (citation omitted)).

preclude witnesses and/or evidence, his motion to dismiss, and his request for a *Willits* instruction.[4] We review a trial court's ruling on sanctions for failure to disclose for abuse of discretion. *State v. Armstrong*, 208 Ariz. 345, 353-54, ¶ 40, 93 P.3d 1061, 1069-70 (2004). A trial court does not abuse its discretion "unless no reasonable judge would have reached the same result under the circumstances." *Id.* at 354, ¶ 40, 93 P.3d at 1070.

A. Motion to Preclude Witnesses and/or Evidence

¶17 Adrian contends that the court abused its discretion by denying his motion to preclude the State from introducing his prison pen pack or additional fingerprint analysis at trial to prove that he was on probation for a felony conviction at the time of the offense, and at sentencing to prove his prior convictions.

¶18 Before trial, the State filed an allegation of eight prior felony convictions and an allegation that Adrian was on probation in Maricopa County Superior Court Case CR2001-006080

[4] Although Adrian also states in the caption to this argument that the trial court abused its discretion by denying his motion for new trial, which was based in part on his previously-alleged *Brady* claims, he does not develop this argument and therefore has waived it. *See State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989). He has also waived his argument that the court erred in failing to sustain his evidentiary objections to the testimony, because he has failed to cite to the record to which he is referring or present any authority or argument. *See id.*

at the time he committed the instant offenses. The State disclosed, as potential evidence to prove his prior convictions, witnesses and exhibits including a fingerprint analyst, Adrian's probation officer, certified copies of Adrian's prior convictions, the original court files on his priors, a copy of his probation file, his fingerprints, and any pen packs.

¶19 The State revealed the first day of trial that it might seek to introduce Adrian's prison pen pack, which it had yet to receive or specifically disclose, as evidence of his prior convictions. The State explained that it had just discovered that the fingerprints it had previously disclosed were too smudged for the State's fingerprint analyst to conclude that Adrian was the person who had been convicted of the prior felonies.

¶20 Although Adrian conceded that he had notice of the State's intent to prove prior convictions, he claimed lack of adequate disclosure of the specific evidence that the State would use to prove the priors, i.e., the prison pen pack and associated foundational witnesses. The court issued an order allowing the State to obtain the original minute entries for comparison, and advised the State to make a request for them through the clerk's office. The court further advised Adrian that it would wait to hear the testimony at trial before addressing his argument that the State would be unable to prove

the priors with appropriate evidence. Adrian filed a motion later that day re-urging his request to preclude admission of the pen pack and to prevent the State from introducing "additional print analysis" at trial and sentencing. The court did not grant the motion.

¶21 At trial, Adrian's probation officer subsequently testified that she had been assigned to supervise Adrian's probation from a felony conviction in Maricopa County Superior Court Case CR 2001-006080, and he was on probation for this conviction on the date of the instant offense. She testified that Adrian was the person in the photograph contained in the probation file to which she had been assigned, and a certified copy of the minute entry shown to her for identification purposes only was identical to the minute entry in her file. A fingerprint analyst testified that she had been able to compare fingerprints taken from Adrian on the previous day with those on the original minute entry in CR 2001-006080, and concluded that the prints matched.

¶22 At the hearing on Adrian's prior convictions before sentencing, the State introduced certified copies of all eight prior felony convictions and elicited testimony from the fingerprint analyst that Adrian's prints matched all but one of the documents. The court ruled that the State had proved seven of the eight prior convictions.

¶23 We find no abuse of discretion in the judge's denial of Adrian's motion to preclude witnesses and/or evidence. As an initial matter, the State ultimately found it unnecessary to introduce evidence of the prison pen pack either at trial or at sentencing. Instead, the State offered (consistent with its disclosure) the testimony of Adrian's probation officer and the fingerprint analyst. We fail to see how the State violated the disclosure rules or Adrian's right to disclosure of favorable evidence pursuant to *Brady*.[5] Moreover, even if the evidence were somehow exculpatory, its disclosure to the jury during trial cured any *Brady* violation. *State v. Jessen*, 130 Ariz. 1, 4, 633 P.2d 410, 413 (1981).

B. Motion to Dismiss

¶24 Adrian also contends that the court abused its discretion by denying his mid-trial motion to dismiss with prejudice. In that motion, Adrian argued that the State had failed before trial to disclose that latent prints lifted from the seized weapons could not exclude him. At argument on the motion, Adrian further argued that the police had swabbed the weapons for DNA. The court found that the late-disclosed

[5] The Supreme Court held in *Brady v. Maryland* that "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. 83, 87 (1963).

fingerprint results were not exculpatory, but were instead "a wash," because the fingerprints were "not of a quality where a person could either be included or excluded." The court also correctly noted that "even if the fingerprint[s] had belonged to someone else, that does not mean that the Defendant did not touch the items that were impounded in this case."

¶25 The court therefore denied the motion to dismiss, but gave Adrian time to interview the fingerprint analyst and the opportunity to call her as a witness. It also allowed either party to elicit testimony that evidence was obtained from the weapons but not tested. Adrian did not ultimately call the fingerprint analyst as a witness in his case,[6] but did call a crime scene specialist to testify that although the weapons were swabbed for DNA, the State did not order any testing of the swabs.

¶26 We find first that the failure to timely disclose the fingerprint results and the DNA swabs did not violate Adrian's due process rights under *Brady* because neither the fingerprint results nor the swabs were either favorable or material to his guilt. The fingerprint results were not favorable because, insofar as the record reveals, the prints were of insufficient quality to include or exclude Adrian. And because the DNA swabs

[6] Adrian noted in his later motion for new trial that he was not certain the testimony would be helpful because "it was unclear how the testimony would go."

were not tested, they were also neither favorable nor unfavorable.

¶27 Nor were the swabs or fingerprint results material to Adrian's guilt. 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). In this case, because the fingerprints were of insufficient quality to reach any conclusion as to whether they matched Adrian's, there is no reasonable probability that they would have made any difference in the outcome at trial. Likewise, even if the DNA swabs had revealed that another person had touched the gun, we find that there is no reasonable probability that this evidence alone would have changed the outcome.

¶28 We find no abuse of discretion in the court's determination of the appropriate sanction for the untimely disclosure of the fingerprint results and the DNA swabs. To determine the appropriate sanction for a discovery violation, the trial court must take into account "the significance of the information not timely disclosed, the impact of the sanction on the party and the victim and the stage of the proceedings at

which the disclosure is ultimately made." Ariz. R. Crim. P. 15.7(a). Here, the court offered Adrian time to interview the fingerprint analyst and the opportunity to call her as his witness, and precluded the State from offering any testimony regarding the results of the analysis. On this record, we cannot say that the court abused its discretion in balancing the relevant factors and addressing the late disclosure in this fashion.

C. Request for a *Willits* Instruction

¶29 Adrian also contends that the trial court committed reversible error by denying his request for an instruction pursuant to *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964), based on the State's failure to impound the identification card discovered in the bedroom dresser drawer, and its failure to test the DNA swabs from the weapons.

¶30 A *Willits* instruction allows the jury to draw an inference from the State's destruction of material evidence that the lost or destroyed evidence would be unfavorable to the State. *State v. Fulminante*, 193 Ariz. 485, 503, ¶ 62, 975 P.2d 75, 93 (1999). A defendant is entitled to a *Willits* instruction when (1) the State fails to preserve accessible, material evidence that "might tend to exonerate him" and (2) there is resulting prejudice. *Id.* The exculpatory potential of the evidence must have been apparent at the time the State lost or

destroyed it. *State v. Davis*, 205 Ariz. 174, 180, ¶ 37, 68 P.3d 127, 133 (App. 2002). "Whether either showing has been made . . . is a question for the trial court; its decision to give or forego a *Willits* instruction will not be reversed absent a clear abuse of discretion." *State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984).

¶31 We find no merit in Adrian's argument that the court abused its discretion in denying a *Willits* instruction on this record. We agree with the trial court that the presence of the identification card in a dresser drawer in the bedroom where the contraband was found was inculpatory, not exculpatory. As for the DNA swabs, not only did they have no tendency to exonerate Adrian, but they were neither lost nor destroyed -- an essential prerequisite to a *Willits* instruction. Nor did the State's failure to test the swabs warrant a *Willits* instruction. A defendant is not entitled to a *Willits* instruction "merely because a more exhaustive investigation could have been made." *State v. Murray*, 184 Ariz. 9, 33, 906 P.2d 542, 566 (1995). "Indeed, in almost every case prosecuted, the claim can be made that the investigation could have been better." *State v. Willcoxson*, 156 Ariz. 343, 346, 751 P.2d 1385, 1388 (App. 1987).

III. PROOF OF PRIOR FELONY CONVICTIONS

¶32 Adrian finally contends that the evidence presented at trial and sentencing was insufficient to prove his prior felony

convictions. He argues that at both the trial and the trial on his prior convictions, the State failed to introduce certified copies of his prior convictions and failed to establish that Adrian was the person to whom the documents that were introduced referred.

¶33 Adrian's argument has no support in the evidence. "The state meets its burden of proving a prior conviction by offering into evidence a certified copy of a defendant's prior conviction and establishing that the defendant is the person to whom the document refers." *State v. Carreon*, 210 Ariz. 54, 65, ¶ 53, 107 P.3d 900, 911 (2005). Here, at trial, the State elicited testimony from the probation officer that she was assigned to supervise Adrian's probation, and that a certified copy of the minute entry showing Adrian's conviction was the same as the minute entry in the probation file for Adrian. The probation officer also testified that although she had been assigned to supervise Adrian's probation only about a month before his arrest and had not met him before trial, his appearance matched the appearance of his photo in the probation file to which she had been assigned. She testified that she had talked to him on the telephone, and he was on probation at the time of the instant offense. The fingerprint analyst testified that Adrian's prints matched those on the original sentencing minute entry for the same prior felony conviction, and

identified the certified copy of the sentencing minute entry as identical to the one he had used for comparison.

¶34 The State did not seek to have the certified copy of the minute entry showing the prior conviction admitted into evidence at trial. But we conclude that the testimony was sufficient to prove that Adrian was on probation for a prior felony conviction at the time of the offense.

¶35 At the trial on Adrian's prior convictions, the court admitted into evidence certified copies of eight prior convictions. A fingerprint analyst testified that Adrian's thumbprint matched the prints on the originals or copies of the court documents in all but one instance. This evidence was more than sufficient to prove the existence of seven prior convictions.

CONCLUSION

¶36 For the foregoing reasons, we affirm Adrian's convictions and sentences.

/s/
_____
PETER B. SWANN, Presiding Judge

CONCURRING:

/s/
_____
MARGARET H. DOWNIE, Judge

/s/
_____
LAWRENCE F. WINTHROP, Judge