DIVISION ONE
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**IN THE COURT OF APPEALS**
**STATE OF ARIZONA**
**DIVISION ONE**

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| STATE OF ARIZONA, | ) | No. 1 CA-CR 09-0336 |
| | ) | |
| Appellee, | ) | DEPARTMENT A |
| | ) | |
| v. | ) | **MEMORANDUM DECISION** |
| | ) | (Not for Publication - |
| RAYMOND IGNACIO LERMA, JR., | ) | Rule 111, Rules of the |
| | ) | Arizona Supreme Court) |
| Appellant. | ) | |
| | ) | |

Appeal from the Superior Court in Maricopa County

Cause No. CR 2008-130228-003 DT

The Honorable Joseph C. Kreamer, Judge

**AFFIRMED**

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Terry Goddard, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Liza-Jane Capatos, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Paul J. Prato, Deputy Public Defender
Attorneys for Appellant

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**D O W N I E**, Judge

**¶1** Raymond Ignacio Lerma, Jr. ("defendant") appeals from his criminal conviction and sentence. For the following reasons, we affirm.

## FACTS AND PROCEDURAL HISTORY[1]

**¶2** In May 2008, police officers executed a search warrant at defendant's home. Defendant, his wife, and a third person were home at the time. When defendant answered the door, he told Officer B.G. he had been sleeping in the master bedroom. Officer B.G. walked through the house and saw baggies of methamphetamine and marijuana in plain view on a dresser in the master bedroom. He also saw glass pipes, digital scales like those commonly used to weigh drugs, and numerous small zip-lock baggies. A television in the master bedroom operated as a receiver to a surveillance camera that monitored the front entrance to the home.

**¶3** Defendant was indicted for possession or use of dangerous drugs, possession or use of marijuana, and possession of drug paraphernalia. A three-day jury trial ensued.

**¶4** Officer B.G. testified that, after issuing *Miranda* warnings and ascertaining defendant understood them, he told defendant about the drugs found in the home. Defendant responded, "I use," and said he had been doing so for "about a year." During the police interview, defendant did not deny knowing about and possessing the drugs and drug paraphernalia.

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[1] We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all reasonable inferences against the defendant. *State v. Vandever,* 211 Ariz. 206, 207 n.2, ¶ 1, 119 P.3d 473, 474 n.2 (App. 2005).

Defendant did not object to Officer B.G.'s trial testimony. One of the final jury instructions stated that jurors could not consider defendant's statements unless they determined, beyond a reasonable doubt, that they were voluntarily made. The jury found defendant guilty as charged.

**¶5** At sentencing, the State alleged two historical priors to enhance defendant's sentence and presented testimony from two witnesses. The trial court found the allegations proven, and defendant was sentenced to concurrent terms of imprisonment. Defendant timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003) and 13-4033 (2001).

**DISCUSSION**

**¶6** Defendant contends the trial court erred by: (1) not *sua sponte* conducting a voluntariness hearing before admitting his "confession";[2] and (2) admitting a report by a non-testifying witness.

[2] The statements defendant made to Officer B.G. were not a direct admission that the drugs found in the bedroom belonged to him. However, the statements were incriminating and were characterized in defendant's opening brief as a "confession." Whether we view the statements as a confession or merely incriminating is not legally significant. *See State v. Owen,* 96 Ariz. 274, 277, 394 P.2d 206, 208 (1964) ("[I]n Arizona when a question is raised as to voluntariness of a statement constituting either admissions against interest, exculpatory or

**1. Voluntariness Hearing**

Pursuant to A.R.S. § 13-3988(A) (2010)[3]:

> In any criminal prosecution brought by the state, a confession shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, *determine any issue* as to voluntariness.[4]

(Emphasis added.)

**¶7** Appellant contends the statute's use of the word "any," combined with the presumption that confessions are involuntary,[5] "creates, as a matter of law, in every confession case an 'issue as to voluntariness,'" requiring the trial court to conduct a voluntariness hearing even if one is not requested. We disagree.

**¶8** "If a statute's language is clear and unambiguous, we apply it without resorting to other methods of statutory

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otherwise, or a confession, it must be resolved by the judge outside the presence of the jury.").

[3] We cite to the current version of this statute because no revisions material to this decision have occurred.

[4] The statute was added in 1969 and re-numbered in 1977, but no substantive changes have been made since its adoption.

[5] *See State v. Montes,* 136 Ariz. 491, 496, 667 P.2d 191, 196 (1983) ("Confessions are prima facie involuntary and the state must show by a preponderance of the evidence that the confession was freely and voluntarily made.").

interpretation." *Hayes v. Cont'l Ins. Co.,* 178 Ariz. 264, 268, 872 P.2d 668, 672 (1994) (citation omitted). Clear statutory language is given its usual meaning unless impossible or absurd consequences result. *Herberman v. Bergstrom,* 168 Ariz. 587, 589, 816 P.2d 244, 246 (App. 1991) (citation omitted). To determine the plain meaning of a term in a statute, courts refer to established and widely used dictionaries. *W. Corr. Group, Inc. v. Tierney,* 208 Ariz. 583, 587, ¶ 17, 96 P.3d 1070, 1074 (App. 2004) (citation omitted).

**¶9** "Issue" is defined as "a point in dispute between two or more parties." Black's Law Dictionary 907 (9th ed. 2009). Applying this definition, A.R.S. § 13-3988 requires a voluntariness hearing when there is a "dispute" as to voluntariness. Arizona case law likewise demonstrates that the presumption of involuntariness does not, without more, constitute a "dispute."

**¶10** In 1960, before the predecessor to A.R.S. § 13-3988 was codified, the Arizona Supreme Court outlined "the procedural steps necessary before a confession may properly be admitted in evidence." *State v. Pulliam,* 87 Ariz. 216, 220, 349 P.2d 781, 784 (1960), overruled on other grounds by *State v. Cobb,* 115 Ariz. 484, 488, 566 P.2d 285, 289 (1977). It held:

> Whenever during the course of a criminal trial a confession *is offered in evidence* the burden is on the prosecution *to lay a prima*

> *facie foundation* for its introduction by preliminary proof showing that it was freely and voluntarily made. Before the confession is received *the defendant if he requests it,* in the absence of the jury, *must* be accorded the opportunity to introduce evidence to overcome the prima facie showing. It is the function of the court in the first instance to resolve may [sic] *conflict in the evidence* on the subject, and if the court concludes that the confession was not free and voluntary it has the power and is duty bound to withhold it from the jury's consideration.

*Id.* (emphasis added). The trial court's role, as stated, was to resolve *conflicts* in the evidence about voluntariness. *See also State v. Stevenson,* 101 Ariz. 254, 256, 418 P.2d 591, 593 (1966) ("[N]o hearing before the judge to determine voluntariness is necessary in cases where a confession was admitted without any objection by the defendant or any assertion by him or his witnesses as to voluntariness.").

**¶11** In 1979, the Arizona Supreme Court identified a "state of confusion" regarding voluntariness hearings and "outline[d] the procedure for determining voluntariness in Arizona." *State v. Alvarado,* 121 Ariz. 485, 487, 591 P.2d 973, 975 (1979). Relying on *Jackson v. Denno,* 378 U.S. 368 (1964) (when a question has been raised about the voluntary nature of a confession, the trial court must make a determination of voluntariness outside the jury's presence) and *Wainwright v. Sykes,* 433 U.S. 72 (1977) (the constitution does not require a voluntariness hearing absent some objection by the defendant to

admission of his confession), the court concluded, "it is the defendant who must move for a voluntariness hearing." *Alvarado,* 121 Ariz. at 487, 591 P.2d at 975. The court then described the process leading up to a voluntariness hearing:

> No later than ten days after the arraignment, the prosecution must disclose all of the defendant's statements. . . .
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> A prehearing conference must be held no later than 25 days after the arraignment . . . . At this conference the prosecution must disclose which, if any, of the defendant's statements will be used at trial . . . . [T]he use of any confession not disclosed at this time will be precluded at trial, unless the court . . . allows the confession to be introduced into evidence and also *gives the defendant* an adequate opportunity *to object and request a voluntariness hearing.* . . .
>
> A notification of all issues that remain in dispute must be filed no later than three days after the prehearing conference. . . . The defendant should, at this time, *file his motion* for a voluntariness hearing. . . . [or] at least twenty days before trial . . . .
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> . . . [T]he hearing itself may be held at any time, prior to the laying of a foundation for a confession, so long as it is out of the presence of the jury. . . .
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> . . . .
>
> . . . *Once the defendant has moved for a voluntariness hearing*, it is the state's burden to prove that the defendant's statements were freely and voluntarily made.

*Id.* at 487-88, 591 P.2d at 975-76 (internal citations omitted and emphasis added).

**¶12** The outlined process places the burden on the defense to raise an issue as to voluntariness and comports with the plain statutory language stating that the trial court's role is to "determine any issue as to voluntariness." A.R.S. § 13-3988.

**¶13** As the State notes, Arizona appellate decisions have never required trial courts, *sua sponte,* to inquire into the nature of a defendant's statements, absent a defense request or suggestion that a statement was involuntary. *See State v. Finn,* 111 Ariz. 271, 275, 528 P.2d 615, 619 (1974) ("The trial judge is not required, Sua [sic] sponte, to enter into an examination outside the presence of the jury to determine possible involuntariness where the question of voluntariness is not raised either by the evidence or the defense counsel."); *State v. Wilson,* 164 Ariz. 406, 407, 793 P.2d 559, 560 (App. 1990) ("[T]here was no burden on the prosecution to show that the statements were made voluntarily since the issue was not before the court absent the filing of a procedurally proper suppression motion.") Even in *Montes,* upon which defendant relies, it was the *defense* that raised the issue of voluntariness. 136 Ariz. at 496, 667 P.2d at 196.

**¶14** In *State v. Sutton,* 115 Ariz. 417, 420, 565 P.2d 1278, 1281 (1977), the prosecutor "placed a check mark on the omnibus hearing form, indicating that there would be a voluntariness issue." On appeal, defendant claimed the trial court erred by

failing to *sua sponte* order a voluntariness hearing. *Id.* The supreme court ruled that the check mark did not "raise[] an issue of voluntariness" because "the defense did not move to suppress the statements nor was a voluntariness hearing requested, nor was there an objection to the admissibility of the statements during the course of the trial." *Id.* The court instead concluded that the defendant "chose," as a matter of trial strategy, not to oppose admission of the statements. *Id.*

**¶15** In *State v. Anaya,* 170 Ariz. 436, 443, 825 P.2d 961, 968 (App. 1991), the defense filed a motion to suppress statements along with several other motions under a pleading titled "Pre-Trial Motions." On appeal, defendant asserted that, "once he filed a motion to suppress statements, the burden was on the court to determine in a voluntariness hearing whether the statements were voluntarily made." *Id.* The supreme court disagreed, finding the motion was not "supported by specific factual allegations" and was thus insufficient to raise the issue of voluntariness. *Id.*

**¶16** Defendant did not raise an issue about the voluntariness of his statements, and the court was not required to *sua sponte* set a voluntariness hearing. Because defendant did not request a hearing or object to admitting his statements at trial, we review their admission only for fundamental error. *State v. Henderson,* 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607

(2005) (citation omitted). "Fundamental error" is error that goes to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial. *State v. Ruggiero,* 211 Ariz. 262, 268, ¶ 25, 120 P.3d 690, 696 (App. 2005) (citations omitted).

**¶17** Nothing in the record suggests any concern about the voluntariness of defendant's statements. The State's pretrial disclosures listed Officer B.G. as a witness and revealed that "[a]ny statements of the defendant" would be presented at trial. The State laid the foundation for defendant's statements by asking Officer B.G. about his experience and training, details regarding the search warrant and its execution, and the drugs discovered. Before telling the jury the exact words defendant used during the interview, Officer B.G. testified he issued *Miranda* warnings, and defendant said he understood them. He stated he did not promise defendant anything or threaten or coerce him into making the statements. The officer then revealed what defendant had told him.

**¶18** A prima facie case for voluntariness is made when an officer testifies a confession was obtained without threats or coercion. *See State v. Jerousek*, 121 Ariz. 420, 424, 590 P.2d 1366, 1370 (1979). Although defense counsel at times objected during Officer B.G.'s testimony, none of the objections related

to admission of defendant's statements. Defendant does not contend he would have presented evidence rebutting Officer B.G.'s testimony at a voluntariness hearing, had one occurred. He thus cannot demonstrate the requisite prejudice under fundamental error review. Moreover, we presume jurors followed the court's final instruction that they could not consider defendant's statements unless they determined, beyond a reasonable doubt, that they were voluntarily made. *See State v. Velazquez,* 216 Ariz. 300, 312, ¶ 50, 166 P.3d 91, 103 (2007) (appellate courts presume jurors follow their instructions).

**2. Written Report**

**¶19** Defendant claims his right to confront witnesses was violated when the trial court admitted a report containing the "expert opinion of a non-testify [sic] fingerprint identification technician." Although we ordinarily review a trial court's ruling on the admissibility of evidence for an abuse of discretion, we conduct a *de novo* review of challenges to admissibility under the Confrontation Clause. *State v. King,* 213 Ariz. 632, 636, ¶ 15, 146 P.3d 1274, 1278 (App. 2006) (citation omitted).

**¶20** The Sixth Amendment guarantees that, in criminal prosecutions, the accused "shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. Similarly, the Arizona Constitution provides that criminal

defendants "shall have the right . . . to meet the witnesses against him face to face." Ariz. Const. art. 2, § 24.

**¶21** Defendant was fingerprinted after the second day of trial to assist the State in proving the existence of prior felony convictions for purposes of sentence enhancement, if defendant were convicted. At sentencing, a Phoenix Police Department forensic scientist testified that the fingerprints taken during trial matched those contained in Department of Corrections records detailing two prior felony convictions. As a basis for her opinion, the scientist reviewed a Prior Convictions Comparison Report generated by a fingerprint technician who initially analyzed and identified the prints, but who did not appear at trial. The scientist testified she performed the "final analysis" necessary to determine "the prints were made by the same individual."

**¶22** The Confrontation Clause does not bar testimonial statements admitted for "purposes other than establishing the truth of the matter asserted." *Crawford v. Washington,* 541 U.S. 36, 59 n.9 (2004) (citation omitted). Facts or data that support a testifying expert's opinion are admissible to demonstrate the basis for that opinion. *See State v. Tucker,* 215 Ariz. 298, 315, ¶ 62, 160 P.3d 177, 194 (2007) ("Because the facts underlying an expert's opinion are admissible only to show the basis of that opinion and not to prove their truth, an

expert does not admit hearsay or violate the Confrontation Clause by revealing the substance of a non-testifying expert's opinion.") (citation omitted); *State v. Rogovich,* 188 Ariz. 38, 42, 932 P.2d 784, 798 (1997) ("Facts or data underlying the testifying expert's opinion are admissible for the limited purpose of showing the basis of that opinion, not to prove the truth of the matter asserted.") (citation omitted).

**¶23** The case at bar is distinguishable from *Melendez-Diaz v. Massachusetts,* 129 S. Ct. 2527 (2009), upon which defendant relies. In *Melendez-Diaz*, a defendant was charged with distributing and trafficking in cocaine. *Id.* at 2531. Three "certificates of analysis" were admitted at trial as "prima facie evidence" that a substance found in his possession was cocaine. *Id.* at 2530-31. The State relied on the certificates to prove the substance was cocaine, rather than presenting the analysts as witnesses. *Id.* at 2531. The Court determined the certificates were testimonial because they were admitted for the "sole purpose" of proving the substance was cocaine--"the precise testimony the analysts would be expected to provide if called at trial." *Id.* at 2532. The Court then held that the defendant "was entitled to 'be confronted with' the analysts at trial." *Id.* Here, however, the testifying scientist independently analyzed the prints, testified about her opinion, and was available for cross-examination; she merely utilized the

fingerprint technician's report as a basis for her opinion. No Sixth Amendment violation occurred.

**CONCLUSION**

**¶24** For the foregoing reasons, we affirm defendant's convictions and sentences.

/s/
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/
MAURICE PORTLEY, Presiding Judge

/s/
LAWRENCE F. WINTHROP, Judge