

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 03/08/2012
RUTH A. WILLINGHAM,
CLERK
BY: DLL

STATE OF ARIZONA,) 1 CA-CR 10-0561
)
Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
)
ABEL LOZANO MOSQUEDA,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-103404-002 DT

The Honorable Susan C. Pineda, Judge

AFFIRMED

Thomas C. Horne, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Jeffrey L. Sparks, Assistant Attorney General
Attorneys for Appellee

Michael S. Reeves Phoenix
Attorney for Appellant

G E M M I L L, Judge

¶1 Defendant Abel Lozano Mosqueda appeals his convictions and sentences for kidnapping and theft by extortion. He contends the trial court erred by not dismissing this case for a purported violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

He also asserts the court unconstitutionally limited his cross-examination of the victim and a witness. Finally, he argues this case should have been dismissed because his treatment while in custody violated his due process rights. We affirm.

BACKGROUND¹

¶2 On January 8, 2009, Mosqueda and two other men forced the victim at gunpoint into Mosqueda's vehicle and transported him to a vacant home in Mesa. The kidnapers demanded money from the victim's family and friends in return for his release. As police officers and the victim's friend, A., were following the kidnapers' directions to conduct the money drop, officers arrested the suspects, including Mosqueda. The victim was subsequently located, and he identified Mosqueda in a photographic lineup as one of the suspects.

¶3 Mosqueda was charged, tried jointly with other co-defendants, and convicted of kidnapping and theft by extortion, both class two felonies and dangerous offenses. The trial court sentenced Mosqueda to consecutive terms of 10.5 years' imprisonment for each conviction. Mosqueda appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona

¹ The applicable standard of appellate review requires that we view the evidence -- and resolve all reasonable inferences -- in the light most favorable to sustaining the verdicts. *State v. Manzanedo*, 210 Ariz. 292, 293, ¶ 3, 110 P.3d 1026, 1027 (App. 2005).

Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010) and -4033(A)(1) (2010).²

ANALYSIS

I. The victim's immigration status

¶14 During *voir dire*, Mosqueda unsuccessfully moved to dismiss on the basis that the State failed to timely disclose the victim's and A.'s illegal immigration status. Mosqueda argues that the trial court's denial of the motion constitutes an abuse of discretion in violation of *Brady*. 373 U.S. at 83. See *State v. Medrano*, 173 Ariz. 393, 399, 844 P.2d 560, 566 (1992) (reviewing the trial court's decision regarding a purported *Brady* violation for abuse of discretion). We find no error.

¶15 *Brady* established that criminal defendants have a due process right to timely disclosure of material evidence. *State v. Gulbrandson*, 184 Ariz. 46, 63, 906 P.2d 579, 596 (1995). The record reflects the victim's and A.'s immigration status first became an issue on January 14, 2010 in the context of appropriate questions to ask potential jurors during *voir dire*. On the following trial day, the prosecutor informed the court and Mosqueda that he had learned after the previous trial day that A. and the victim "do not have status in the United

² Absent material revisions to a statute after the date of an offense, we cite the current version.

States." This disclosure was therefore timely. See *id.* at 62-63.

¶16 Furthermore, we note that Mosqueda and a co-defendant elicited trial testimony from the victim regarding his illegal presence in the United States.³ See *State v. Bracy*, 145 Ariz. 520, 528, 703 P.2d 464, 472 (1985) ("When previously undisclosed exculpatory information is revealed at the trial and presented to the jury, there is no *Brady* violation.").

¶17 For these reasons, the court did not abuse its discretion in denying the motion to dismiss for this purported *Brady* violation.⁴

II. Jail conditions

³ The victim's testimony ostensibly impeached his statement that he earned a living by buying and selling cars.

⁴ In an apparently related issue, Mosqueda asserts the trial court abused its discretion "by limiting the scope of cross-examination of the victim and witness." Mosqueda, however, does not specify what court ruling he is challenging, nor does he clearly articulate a substantive argument that the court committed reversible error. Arizona Rule of Criminal Procedure 31.13 states, in pertinent part: "The appellant's brief shall include . . . the contentions of the appellant with respect to the issues presented, and the reasons therefore, with citations to the authorities, statutes and parts of the record relied on." Ariz. R. Crim. P. 31.13(c)(1)(vi); see also *State v. Moody*, 208 Ariz. 424, 452, ¶ 101, n.9, 94 P.3d 1119, 1147 n.9 (2004) ("In Arizona, opening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised.") (quoting *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989)). Because Mosqueda failed to brief this issue in accordance with the Rules, we decline to address it. See *State v. Sanchez*, 200 Ariz. 163, 166, ¶ 8, 24 P.3d 610, 613 (App. 2001) (issue waived because defendant failed to develop argument in his brief).

¶18 During a break in the presentation of opening statements, defendants moved for a mistrial on the basis that they were receiving inadequate food and opportunities to sleep while in custody. Defense counsel described Mosqueda as "falling asleep, head in [his] hands, you know, head down, having this dejected look[,]" and thus, to the jury, counsel argued he appeared to have "giv[en] up." The trial court disagreed with this description, stating:

From my perspective I have not seen your clients stooping. I have been paying attention to the fact that your clients have been attentive to the court interpreter. . . . I am seeing your clients appearing to me to be listening carefully. . . . And [we've had] three jury panels. . . . We resumed on Tuesday with jury selection, a very long process for everybody. And I'm not sure if the - appearance of being tired after a very long process for everyone, including the jurors is something that would have been considered negatively by the jurors in this case at this point in time. . . . [T]he jurors who have been empanelled have been focusing on their - the instructions that were given, and the questions being asked by the [c]ourt.

Based on these observations, the court denied the mistrial motion. Nonetheless, the court recessed early "to alleviate any physical and mental fatigue that [defendants] may be exhibiting today."

¶19 Further, the court held a hearing the following trial day where the sheriff's counsel described the procedures for

transporting and feeding in-custody defendants. Sheriff's counsel categorically denied that the defendants were not offered sustenance or the opportunity to sleep. The trial judge and the attorneys then personally toured "the facility" that day before resuming opening statements, and sheriff's counsel agreed to investigate sleep and feeding issues specific to the defendants during the previous two weeks.⁵

¶10 Mosqueda contends that the trial court abused its discretion in denying the motion for mistrial because his lack of adequate food and sleep while in custody amounted to a due process violation. We disagree.

¶11 "A declaration of a mistrial is the most dramatic remedy for trial error and should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted." *State v. Adamson*, 136 Ariz. 250, 262, 665 P.2d 972, 984 (1983). A trial court's denial of a mistrial motion is reversible only if it is "palpably improper and clearly injurious." *State v. Walton*, 159 Ariz. 571, 581, 769 P.2d 1017, 1027 (1989). This court has previously noted that the rationale for affording a trial court discretion in deciding whether to order a mistrial - at least in

⁵ Thereafter, the record does not reflect the issue was ever revisited aside from the following day when an inadvertent scheduling error resulted in Mosqueda being transported to court at the wrong time causing him to miss lunch. Mosqueda does not address this incident on appeal.

cases alleging prosecutorial misconduct - is that the trial court is in the best position to determine what effect if any the purported error had on the jury. See, e.g., *State v. Blackman*, 201 Ariz. 527, 545, ¶ 76, 38 P.3d 1192, 1210 (App. 2002).

¶12 Applying that rationale here, we find no abuse of discretion in the court's denial of the motion for mistrial. The court found that Mosqueda appeared alert and whatever hunger or tiredness he exhibited at trial did not negatively impact the jury. Additionally, the court recessed trial early to alleviate whatever fatigue Mosqueda may have been experiencing the day the motion was made, and the court took appropriate measures to ensure he was afforded adequate opportunities to eat and sleep while in custody. On this record, we do not discern reversible error in denying the mistrial motion.

CONCLUSION

¶13 Mosqueda's convictions and sentences are affirmed.

_____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

_____/s/_____
JON W. THOMPSON, Presiding Judge

_____/s/_____
MAURICE PORTLEY, Judge