IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

CHRISTOPHER DAVID NELSON,
Appellant.

No. 2 CA-CR 2016-0029
Filed December 16, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pinal County
No. S1100CR201500533
The Honorable Joseph R. Georgini, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Jonathan Bass, Assistant Attorney General, Tucson
Counsel for Appellee

Suzuki Law Offices, L.L.C., Phoenix
By Richard J. Suzuki and Matthew Bartz
Counsel for Appellant

MEMORANDUM DECISION

Judge Staring authored the decision of the Court, in which Presiding Judge Howard and Judge Espinosa concurred.

S T A R I N G, Judge:

¶1 After a jury trial, appellant Christopher Nelson was convicted of eleven counts of sexual exploitation of a minor. The trial court sentenced him to consecutive, minimum, ten-year prison terms, for a total of 110 years. On appeal, Nelson argues the trial court abused its discretion in denying his motion to suppress evidence and in precluding testimony from an unnamed expert witness. We affirm Nelson's convictions and sentences.

Factual and Procedural Background

¶2 In 2014, various Arizona law enforcement agencies investigated a "cyber tip" from the National Center for Missing and Exploited Children (NCMEC), after an internet "cloud" storage service provided notice that one of its Arizona subscribers had uploaded child pornography to his or her account. After the point of origin had been identified, Detective Ashley Walker of the Coolidge Police Department obtained a search warrant for the address, naming M.D., the registered subscriber, and her son, R.H., who was known to occupy the premises.

¶3 When Detective Walker and other officers executed the search warrant, they found no computer equipment capable of uploading images to an internet storage service. However, they observed a cable running from the house they were searching into Nelson's house next door, which could have been used to provide internet service from M.D.'s account to computers in that home.[1]

[1]Nelson is M.D.'s grandson and R.H.'s nephew.

Officers uncovered a portion of the cable that was "superficially buried under some of the dirt" on Nelson's property, adjacent to the sidewalk, and Walker asked Coolidge Police Detective Bradley Fulton to make contact with anyone present there.

¶4 Nelson answered the door, and Detective Fulton entered the home and saw computer equipment in an interior room. He directed Nelson to leave all the electronics in place and to take his children to the Coolidge police station, where Fulton would later meet him. Walker later returned with a search warrant for Nelson's home, taking as evidence a computer, cable modem, router, and an external hard drive, along with other electronic equipment. Nelson filed a motion to suppress the evidence, arguing officers impermissibly entered and conducted an illegal, warrantless search after knocking on his door. The trial court denied the motion after an evidentiary hearing.

¶5 At trial, Walker described her forensic analysis of the equipment seized from Nelson's home, stating she had located eight videos and three images depicting child pornography on the computer's internal hard drive and the external hard drive. Also, M.D.'s internet provider had identified the serial number of the cable modem used to upload pornographic images to the internet storage service, and it matched the serial number of the cable modem found in Nelson's home.

¶6 After the state rested, Nelson attempted to schedule the testimony of a "blind" expert for the defense, stating the expert had no knowledge of the facts in the case but would testify generally "about routers, about security of routers and things like that." The state objected on grounds no expert had been disclosed and Nelson had shown no "substantial need" for the testimony. The trial court denied Nelson's request, and he then testified on his own behalf, denying he had ever seen or downloaded child pornography. He also told the jury of problems and unusual occurrences related to his access to WiFi service and said he had told one of the detectives that he believed his computer had been hacked.

¶7 Nelson was convicted and sentenced as described above. On appeal, Nelson contends the trial court abused its discretion in denying his motion to suppress and in precluding the expert testimony he proposed at trial.

Motion to Suppress

¶8 Nelson argues police officers violated his Fourth Amendment rights by entering the curtilage of his property and his residence without a warrant, without his consent, and in the absence of exigent circumstances. He thus maintains the search warrant obtained after the initial police visit to the property was "based upon illegal police conduct," and he contends the trial court was required to suppress all evidence discovered pursuant to that warrant. Relying on *Franks v. Delaware*, 438 U.S. 154 (1978), and *State v. Buccini*, 167 Ariz. 550, 558, 810 P.2d 178, 186 (1991), Nelson also argues the search warrant was invalid because Walker's supporting affidavit omitted any reference to the police presence on Nelson's property earlier that day.

¶9 When reviewing the denial of a motion to suppress, we consider only the evidence presented at the suppression hearing and view it in the light most favorable to upholding the court's ruling. *State v. Caraveo*, 222 Ariz. 228, n.1, 213 P.3d 377, 378 n.1 (App. 2009). Although we review a denial of a motion to suppress for an abuse of discretion, we review constitutional and purely legal issues de novo. *State v. Gay*, 214 Ariz. 214, ¶ 4, 150 P.3d 787, 790 (App. 2007). We will not reverse a trial court's ruling on a motion to suppress absent clear and manifest error. *State v. Gulbrandson*, 184 Ariz. 46, 57, 906 P.2d 579, 590 (1995).

¶10 "Whether the exclusionary sanction is appropriately imposed in a particular case . . . is 'an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.'" *United States v. Leon*, 468 U.S. 897, 906 (1984), *quoting Illinois v. Gates*, 462 U.S. 213, 223 (1983). For the purpose of this decision, we assume, without deciding, that Nelson's Fourth Amendment rights were violated when police officers, acting without a warrant and without his

consent, entered his yard to unearth a portion of the cable found between the two houses and when Fulton entered his house after knocking on the door. *See Florida v. Jardines*, ___ U.S. ___, ___-___, 133 S. Ct. 1409, 1414-16 (2013) (curtilage is "'part of the home . . . for Fourth Amendment purposes'"; "implicit license" for police officer without warrant to approach and knock on door extends no further than that held by any private citizen; "social norms that invite a visitor to the front door do not invite him there to conduct a search"), *quoting Oliver v. United States*, 466 U.S. 170, 180 (1984).

¶11 The exclusionary rule requires suppression of evidence obtained directly or indirectly from an illegal search, but the rule does not apply to evidence obtained through an "independent source," such as "evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently from activities untainted by the initial illegality." *Murray v. United States*, 487 U.S. 533, 536-37 (1988); *see also Segura v. United States*, 468 U.S. 796, 813-14 (1984) (illegality of initial entry "irrelevant" to admissibility of evidence later seized under warrant obtained with probable cause established from "independent source" that predated initial entry).

¶12 In *Murray*, after federal agents illegally entered a warehouse under their surveillance and saw bales of marijuana in plain view, they obtained a search warrant for the premises and seized the marijuana and other evidence pursuant to that warrant. 487 U.S. at 535-36. Like Walker here, "in applying for the warrant, the agents did not mention the prior entry, and did not rely on any observations made during that entry." *Id.* The Supreme Court held the evidence would be admissible "[s]o long as a later, lawful seizure is genuinely independent of an earlier, tainted one," but suppression would be required if "the agents' decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant." *Id.* at 542.

¶13 Similarly, in *Gulbrandson*, 184 Ariz. at 57-58, 906 P.2d at 590-91, police officers had conducted an illegal "protective sweep"

of a defendant's apartment before obtaining a search warrant, and he moved to suppress the evidence seized after the warrant was issued. In that case, the affidavit supporting the search warrant contained information from both the earlier, illegal search and from independent sources, and our supreme court explained,

> The proper method for determining the validity of the search . . . is to excise the illegally obtained information from the affidavit and then determine whether the remaining information is sufficient to establish probable cause. In addition, the state must show that information gained from the illegal entry did not affect the officer's decision to seek the warrant or the magistrate's decision to grant it.

Id. at 58, 906 P.2d at 591.

¶14 In her affidavit to obtain a search warrant for Nelson's residence, Walker included information about the tip received from NCMEC and explained that the search warrant executed on R.H.'s residence earlier that day "did not result in locating a WiFi router or any corresponding computer equipment," but that "it was determined that the [internet provider's cable] service had a cable splitter attached and the service was also feeding" Nelson's residence. No mention was made of the computer equipment Fulton had observed after crossing the threshold of Nelson's home.

Warrantless Entry into Nelson's Home

¶15 At an evidentiary hearing on Nelson's motion to suppress, Walker acknowledged that, in her case report, she had written, "The second warrant was requested based on the previously known facts of the case and the fact [that] upon entry to [Nelson's] residence . . . [, officers] observed several items which have the ability to connect to the Internet and have memory storage capability." But Walker said she saw no reason to include Fulton's observations in her affidavit, and she agreed that the NCMEC cyber

tip, the absence of computer equipment at R.H.'s residence, and her observation of the cable connection between the two houses provided "probable cause to believe that there would be computer equipment relating to [her] investigation" in Nelson's home. When asked if she "would . . . still have sought a search warrant" for Nelson's home if Fulton had not told her of the computer equipment he had seen there, she responded, "Yes, I would've."

¶16 Based on this evidence, the trial court reasonably could find that Fulton's observations after his allegedly illegal entry into Nelson's home "did not affect [Walker's] decision to seek the warrant or the magistrate's decision to grant it." *Gulbrandson*, 184 Ariz. at 58, 906 P.2d at 591. To the extent Nelson argued evidence seized pursuant to the search warrant had been tainted by Fulton's warrantless entry into Nelson's home, the court did not abuse its discretion or otherwise err in denying Nelson's motion to suppress.

Warrantless Entry to Unearth Buried Cable

¶17 Although Nelson did not identify this issue in his motion to suppress, it was raised at the evidentiary hearing and apparently considered by the trial court without objection by the state. Accordingly, we will consider Nelson's related arguments on appeal.

¶18 At the evidentiary hearing, Walker explained that the cable originated at the home next door to Nelson's, where police were in the process of executing the first search warrant. According to Walker, as police began pulling the cable up on that property, it came "out of the ground" on Nelson's property as well, and she could see, while legally on the property that was the subject of her search warrant, that the cable "re-emerged" on Nelson's property "and went into his home." Thus, although Walker acknowledged that one of the officers then entered Nelson's yard and began pulling up the cable that ran along the sidewalk on his property, the cable connection that gave rise to probable cause to search Nelson's home was discovered before any illegal entry by police. The trial court did not abuse its discretion or otherwise err in concluding suppression of the evidence seized by later search warrant was not required,

notwithstanding the earlier improper entry to unearth cable on Nelson's property. *See Segura*, 468 U.S. at 815 (stating "evidence will not be excluded as 'fruit' [of an unlawful search] unless the illegality is at least the 'but for' cause of the discovery of the evidence").

Search Warrant Not Invalidated for "Material Omission"

¶19 Nelson also argues the search warrant was invalid because Walker "failed to inform the magistrate that the police engaged in illegal conduct which allowed them to obtain incriminating evidence supporting probable cause for the warrant." Pursuant to *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978), "a defendant is entitled to a hearing to challenge a search warrant affidavit when he makes a substantial preliminary showing (1) that the affiant knowingly, intentionally, or with reckless disregard for the truth included a false statement in the supporting affidavit, and (2) the false statement was necessary to the finding of probable cause." *Frimmel v. Sanders*, 236 Ariz. 232, ¶ 27, 338 P.3d 972, 979 (App. 2014). "A *Franks* challenge is also authorized when it has been shown 'a warrant affidavit valid on its face . . . contains deliberate or reckless omissions of facts that tend to mislead.'" *Id.*, *quoting United States v. Stanert*, 762 F.2d 775, 781 (9th Cir.), *amended on other grounds*, 769 F.2d 1410 (9th Cir. 1985).

¶20 We agree with the state that Nelson has waived this issue, but for fundamental, prejudicial error, because he did not raise the issue or request a *Franks* hearing in his motion to suppress. In his reply, Nelson argues the issue was preserved for appeal by his questioning at the evidentiary hearing, when he asked Walker whether her affidavit omitted reference to Fulton's observations "because it might look bad to [the magistrate] that you guys had already entered the residence without a warrant." But Walker had responded "No" to his question and said there "was no reason to" include Fulton's observations, later explaining the absence of computer equipment at R.H.'s residence and the cable connection between the two homes had been sufficient to establish probable cause. Had the issue of a *Franks* hearing been before the trial court, this testimony would not have established the "substantial

preliminary showing" required to warrant further inquiry. *See Frimmel*, 236 Ariz. 232, ¶ 27, 338 P.3d at 979.

¶21 Moreover, for the reasons already addressed, Nelson cannot show prejudice from the affidavit's omission of reference to Fulton's warrantless entry into the home. To warrant suppression of evidence pursuant to *Franks*, a defendant must prove both that "omissions were made intentionally or with reckless disregard to their truth" and that the "addition of the omitted facts" to the affidavit "would defeat a finding of probable cause." *Id.* ¶ 41. Probable cause could be found based on the cyber tip, the absence of computer equipment at the subscriber's address, and the discovery of the coaxial cable between that residence and Nelson's—information discovered through independent sources before any illegal entry by police. Fulton's later observations were thus immaterial to the existence of probable cause for the search warrant. *See Segura*, 468 U.S. at 813-14. The trial court did not abuse its discretion in concluding the search warrant was valid and in denying Nelson's motion to suppress.

Preclusion of Expert Testimony

¶22 Nelson argues the trial court abused its discretion when it precluded him from calling an unidentified "blind" expert to testify "about routers in general and about the security of routers." Although Nelson does not dispute that his request, at the close of the state's case, to present undisclosed expert testimony was "late" under the requirements of Rule 15.2, Ariz. R. Crim. P., he maintains "there was no reason for such a harsh [discovery] sanction." Without specific elaboration, he contends the proffered testimony would have been "material to the defense, because the computer rebuttal expert witness would have called into question Detective Walker's testimony, and raise a reasonable doubt as to whether there was a reasonable probability that someone other than [Nelson] could have hacked into the security of his router." Relying on *State v. Delgado*, 174 Ariz. 252, 257, 848 P.2d 337, 342 (App. 1993), he asserts the trial court's preclusion of this testimony violated his Sixth Amendment right to a complete defense.

¶23 The imposition of sanctions for a discovery violation is within the sound discretion of the trial court, and we will not reverse a court's decision on the issue absent a showing of prejudice. *Id.* at 256, 848 P.2d at 341. Although Rule 15.7(a), Ariz. R. Crim. P., authorizes a court to preclude testimony as a sanction for a disclosure violation, "doing so should be a remedy of last resort." *State v. Burns*, 237 Ariz. 1, ¶ 91, 344 P.3d 303, 325 (2015). Thus, before a court may preclude a witness under Rule 15.7, it "must examine the surrounding circumstances, specifically considering the following factors: (1) how vital the precluded witness is to the proponent's case; (2) whether the witness's testimony will surprise or prejudice the opposing party; (3) whether bad faith or willfulness motivated the discovery violation; and (4) any other relevant circumstances." *State v. Naranjo*, 234 Ariz. 233, ¶ 30, 321 P.3d 398, 407 (2014). "Preclusion may be an appropriate sanction when a party engages in 'willful misconduct, such as an unexplained failure to do what the rules require.'" *Id.* ¶ 34, *quoting State v. Killean*, 185 Ariz. 270, 271, 915 P.2d 1225, 1226 (1996).

¶24 On this record we cannot determine whether Nelson suffered any prejudice from the trial court's preclusion of his proposed witness because he failed to make an offer of proof regarding the expected testimony. As our supreme court has explained, "A party can claim the exclusion of evidence is error only if the exclusion affects the party's substantial rights and the party makes an offer of proof." *State v. Hernandez*, 232 Ariz. 313, ¶ 42, 305 P.3d 378, 387 (2013), *citing* Ariz. R. Evid. 103(a)(2). "An offer of proof is critical because it permits 'the trial judge to reevaluate his decision in light of the actual evidence to be offered, . . . and to permit the reviewing court to determine if the exclusion affected the substantial rights of the party offering it.'" *Id.*, *quoting Fortunato v. Ford Motor Co.*, 464 F.2d 962, 967 (2d Cir. 1972).

¶25 In requesting leave to call an undisclosed expert witness mid-trial, Nelson did not identify the witness, the specific substance of his or her testimony, or how that testimony would rebut Detective Walker's testimony or be material to his defense. *See State v. Towery*, 186 Ariz. 168, 179, 920 P.2d 290, 301 (1996) (to preserve objection to exclusion of evidence requires, "[a]t a minimum, an offer of proof

stating with reasonable specificity what the evidence would have shown"); *cf. State v. Carlson*, 237 Ariz. 381, ¶ 25, 351 P.3d 1079, 1089 (2015) (trial judge "must act as a gatekeeper by applying [Rule 702, Ariz. R. Evid.] to admit 'only relevant and reliable expert testimony'"), *quoting State v. Salazar–Mercado*, 234 Ariz. 590, ¶ 9, 325 P.3d 996, 999 (2014).[2] Nor has any such specific argument been developed on appeal. As in *Hernandez*, "the absence of an offer of proof renders us unable to evaluate the trial court's ruling" and precludes Nelson's argument on appeal. 232 Ariz. 313, ¶ 44, 305 P.3d at 387-88. Accordingly, we cannot say the trial court abused its discretion in denying Nelson's request to present expert testimony. *See id.*

Disposition

¶26 For the foregoing reasons, we affirm Nelson's convictions and sentences.

[2]We are unpersuaded by Nelson's assertion in his reply that he "was not given the opportunity to make an offer of proof" in the court below. He did not request that opportunity.