FILED BY CLERK
MAR 17 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. OMAR NAVARRO AMAVISCA, Appellant.	2 CA-CR 2007-0267 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20063243

Honorable Hector E. Campoy, Judge

AFFIRMED

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E C K E R S T R O M, Presiding Judge.

¶1 Following a jury trial, appellant Omar Amavisca was convicted of one count of first-degree burglary and three counts each of armed robbery, kidnapping, and aggravated assault with a deadly weapon. The jury found all the offenses to be of a dangerous nature. The trial court then sentenced Amavisca to a combination of consecutive and concurrent, presumptive prison terms totaling twenty-one years. On appeal, Amavisca argues the trial court erred in denying his motion for judgment of acquittal on all counts, in ruling admissible certain evidence concerning the shooting of Amavisca's brother, and in denying Amavisca's motions to suppress statements he had made to police officers. We affirm his convictions and sentences for the reasons set forth below.

Sufficiency of Evidence

¶2 We view the facts in the light most favorable to upholding the jury's verdicts, resolving all reasonable inferences from the evidence against the defendant. *See State v. Cox*, 214 Ariz. 518, ¶ 2, 155 P.3d 357, 358 (App.), *aff'd*, 217 Ariz. 353, 174 P.3d 265 (2007). In the early morning hours of March 11, 2006, a group of men invaded the apartment of a woman named D. D. and two of her female friends, A. and B., were in the apartment at the time. When B. answered a knock at the door, an unknown man pushed it open, allowing others to rush inside. According to B. and D., the four men who entered the apartment all participated in the events that followed.[1] Two men wore bandanas over their faces, another

[1]Although B. testified she saw "about four or five" men enter the apartment, she described only four people. D. also initially estimated the intruders numbered four or five people but, after describing them, she clarified that there were only four.

wore a white, hooded sweater with the hood up to obscure his face, and the fourth man, whose face was uncovered, appeared older than the others and wore distinctive boots.

¶3 B. testified one of the men grabbed her, held a gun to her head, and demanded money. He then carried B. into a bedroom, tied her up, and threatened to kill her. The intruder took off B.'s pants and underwear and put his fingers into her vagina. Another man threatened to stab B. with a knife. When a pillowcase was placed over B.'s head, she screamed and was struck forcefully in the back of the head. During the home invasion, each of the men demanded money and participated in ransacking the apartment, and B. testified the older man gave directions to the others. The intruders took B.'s silver bracelet and cellular telephone.

¶4 D. testified that one of the intruders also pointed a gun at her head and demanded money. He then grabbed her and forced her into her bedroom. The intruders took fifteen dollars in cash from D. and emptied her dresser drawers onto her bed. They then moved her into the room with B. There, one man choked D. and partially removed her pants and underwear, ripping a large hole in the pants. Another man punched her repeatedly in the face and tried to tie her up with an electrical cord. Before leaving, the intruders also took some digital video discs and a video camera.

¶5 A. testified that she was in the shower when the invasion occurred. Two of the intruders kicked down the door to the bathroom, and one of them pointed a gun at her and ordered her out of the shower. They then choked her with an electrical cord, punched and

kicked her in the face, and touched her breasts and vagina. A. testified that an older man gave orders to the two men who had initially broken into the bathroom, telling them to hurry up and look for something. One intruder ripped A.'s earring from her ear.

¶6 After the men left, the women heard gunshots outside the apartment. Through a window, A. saw a group of men disperse in the parking lot and watched some leave in a white vehicle. Amavisca's brother, who wore boots matching the victims' descriptions, had been shot in the parking lot and later died from his wounds. After his arrest, Amavisca admitted to police that he had been present during both the home invasion and his brother's shooting but denied participating in any criminal activity. Amavisca also told police he owned a white sedan.

¶7 The state charged Amavisca with three counts of armed robbery, three counts of kidnapping, and three counts of aggravated assault with a deadly weapon, with the separate counts listing B., D., and A. as the respective victims of each of the three charges. The indictment also charged Amavisca with one count of first-degree burglary and one count of sexual assault. At the close of the state's case, Amavisca moved pursuant to Rule 20, Ariz. R. Crim. P., for a judgment of acquittal on all counts. The state acknowledged that count four, the sexual assault charge, was "problematic" and stated it had no objection to withdrawing the count. The trial court entered a judgment of acquittal on count four but denied the motion as to the remaining counts.

¶8 Amavisca contends the trial court erred in denying his Rule 20 motion because all the counts in his indictment equally rested on evidence of his "admitted mere presence at the scene" and the victims' testimony that all the intruders were participating in criminal activity. He emphasizes that "the quantity of evidence supporting the . . . ten counts" of which he was convicted was no different than that supporting count four, the sexual assault charge, which the trial court dismissed. He therefore concludes the state presented insufficient evidence on the remaining charges to convict him as either a principal or an accomplice.

¶9 A trial court should grant a judgment of acquittal pursuant to Rule 20 "only where there is no substantial evidence to warrant conviction." *State v. Fernane*, 185 Ariz. 222, 224, 914 P.2d 1314, 1316 (App. 1995). This court "will find reversible error based on insufficient evidence only where there is a complete absence of probative facts to support a conviction." *Id.* "'If reasonable [persons] may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial.'" *State v. Davolt*, 207 Ariz. 191, ¶ 87, 84 P.3d 456, 477 (2004), *quoting State v. Rodriguez*, 186 Ariz. 240, 245, 921 P.2d 643, 648 (1996) (alteration in *Rodriguez*). Circumstantial evidence may constitute the substantial evidence necessary to support a conviction. *State v. Blevins*, 128 Ariz. 64, 67, 623 P.2d 853, 856 (App. 1981). It is the jury's role to weigh the credibility of witnesses and resolve any inconsistencies in the evidence. *State v. Lee*, 151 Ariz. 428, 429, 728 P.2d 298, 299 (App. 1986).

¶10 Preliminarily, we note that an appellate court will only address issues that are properly before it. *See Doe v. Roe*, 191 Ariz. 313, ¶ 28, 955 P.2d 951, 960 (1998). Because the state has not cross-appealed the trial court's judgment of acquittal on count four pursuant to A.R.S. § 13-4032(3), the propriety of that ruling is not at issue. Furthermore, Amavisca has not alleged the state presented insufficient evidence to prove all the elements of the crimes of which he was convicted. Instead, he disputes that the state presented substantial evidence identifying him as either a perpetrator of or accomplice to these crimes. But we find the evidence presented to be sufficient in this regard.

¶11 The trial court provided the jurors an accomplice-liability instruction that correctly informed them they could find Amavisca guilty of all the crimes he had intended to aid, solicit, facilitate, or command. *See* A.R.S. § 13-303(B)(2) (defendant liable for aiding criminal act of another); *State v. Swoopes*, 155 Ariz. 432, 434, 747 P.2d 593, 595 (App. 1987) (defining accomplice as "accessory who knowingly and with criminal intent participates, associates or concurs with another in the commission of a crime"). Amavisca admitted having been among a group of people who, according to multiple victims' testimony, illegally entered a dwelling with their faces covered and acted in concert to commit a series of related felonies there. Based on the victims' testimony that all of the intruders had engaged in the criminal activity, often at the direction of one of them, the jury was entitled to believe that Amavisca had entered the apartment as part of a planned home

invasion and to reject his self-serving statement that he personally had done nothing wrong. The state presented sufficient evidence to support all of Amavisca's convictions.

Evidence of Shooting

¶12 Amavisca further contends the trial court erred in not precluding evidence of his brother's shooting. In his motion in limine, Amavisca emphasized that the shooting took place after the home invasion and that the person charged with the murder was one of Amavisca's codefendants in the home invasion case, whose trial had been severed from Amavisca's. Because Amavisca was not charged in connection with his brother's death, he argued that evidence of the shooting was therefore irrelevant, unduly prejudicial, or inadmissible other-act evidence. The state sought to introduce evidence of the shooting on the grounds it impeached Amavisca's statements to police officers denying involvement in the home invasion and showed his consciousness of guilt because he had fled the scene and had not personally sought medical attention for his brother.

¶13 The trial court granted the motion in part and precluded evidence of the fact that Amavisca's brother had died from his wounds. The court found, however, that some evidence of the shooting was relevant and its probative value outweighed the risk of undue prejudice. The court limited the use of this evidence with the following instruction to the jury:

> You are instructed that the evidence relating to the shooting of [Amavisca's brother] may only be considered in your evaluation of [Amavisca]'s response to the shooting, the allegation that [Amavisca] or his accomplices were armed at the

> time of the alleged robberies or burglary and in evaluating the statements made by [Amavisca] to the police.
>
> The state has not charged [Amavisca] with any crime relating to the shooting of [his brother]. The shooting of [his brother] should not be used for any other purpose.

¶14 Amavisca argues the trial court erred in balancing the potential prejudice and probative value of this evidence under Rule 403, Ariz. R. Evid. He also suggests the jury necessarily considered the evidence as proof of his bad character, which is prohibited by Rule 404(a), Ariz. R. Evid. "We review a trial court's evidentiary decisions for an abuse of discretion, giving deference to its determination on relevance and unfair prejudice . . . ." *State v. Smith*, 215 Ariz. 221, ¶ 48, 159 P.3d 531, 542 (2007) (citations omitted).

¶15 As the state correctly argued to the trial court, the challenged evidence was relevant and probative in that it tended to corroborate the presence of a gun during the home invasion and show Amavisca's lack of truthfulness with detectives and his involvement in the home invasion. The court emphasized that Amavisca was not charged with the shooting and precluded the potentially inflammatory evidence of his brother's death, thereby reducing the possibility of prejudice in keeping with Rule 403. We therefore find no abuse of discretion in the court's implicit conclusion that the probative value of the evidence, as limited, outweighed any remaining prejudicial impact.

¶16 In addition, because jurors are presumed to follow a court's instructions, *State v. McCurdy*, 216 Ariz. 567, ¶ 17, 169 P.3d 931, 938 (App. 2007), we assume the jury

considered the evidence as directed by the trial court's clear limiting instruction, not for any improper purpose.

Motion to Suppress

¶17 Amavisca also argues the trial court erred in not suppressing the statements he made to police officers, which he claims were involuntary and taken "in violation of [his] *Miranda* rights."[2] "In reviewing the denial of a motion to suppress evidence, we view the facts in the light most favorable to upholding the trial court's ruling . . . [and consider] only the evidence presented at the suppression hearing." *State v. Wyman*, 197 Ariz. 10, ¶ 2, 3 P.3d 392, 394 (App. 2000) (citation omitted). We review a trial court's denial of a motion to suppress for a clear abuse of discretion, but we review its legal conclusions de novo. *State v. Sanchez*, 200 Ariz. 163, ¶ 5, 24 P.3d 610, 612 (App. 2001); *see also State v. Spreitz*, 190 Ariz. 129, 144, 945 P.2d 1260, 1275 (1997).

Voluntariness

¶18 Amavisca argues his post-arrest statements were involuntary and inadmissible because he had been injured and was in pain during his interrogation and the police offered him medical treatment so he would make an incriminating statement. At the suppression hearing, Amavisca submitted a transcript of an interview with police detectives following his arrest. Because Amavisca primarily spoke Spanish and the detective assigned to the case

[2]*Miranda v. Arizona*, 384 U.S. 436 (1966).

could not, a second detective helped conduct the interview.[3] In the transcript, Amavisca claimed he had been hit by the arresting officers during his arrest. He also complained of injuries to his thumb and knee that he attributed to the officers.

¶19 The detectives who testified at the hearing had not arrested Amavisca and therefore did not directly refute his claims of abuse. They testified, however, that the finger he complained of having injured had previously been partially amputated. Amavisca admitted it was not causing much pain, and the detectives testified that Amavisca's knee injury was either a minor scrape or a preexisting condition.[4] Both detectives further testified Amavisca did not appear to be in distress during the interview, and they believed Amavisca had not required immediate medical attention. At one point, a detective told Amavisca, "[W]e are going to call a medic right now to see if, that you can see him," but none was immediately called or furnished. The detectives testified that they had not threatened Amavisca physically or verbally during the interview and that at no point had he appeared intimidated. The trial court found Amavisca's statements had not been induced by coercion or promises and denied the motion to suppress.

¶20 Because confessions are presumed to be involuntary, the state has the burden to prove, by a preponderance of the evidence, that incriminating statements were freely

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[3]Although Amavisca established during cross-examination that Detective Diaz, the Spanish-speaking officer who assisted in the interview, was not yet a detective when the interview took place, we refer to him by his current title.

[4]Detective Diaz also testified that Amavisca had complained of his foot hurting, apparently from an unrelated former injury.

given. *State v. Tapia*, 159 Ariz. 284, 287, 767 P.2d 5, 8 (1988). In making this determination, a court considers the totality of the circumstances. *State v. Newell*, 212 Ariz. 389, ¶ 39, 132 P.3d 833, 843 (2006). The state makes a prima facie case for admission of a confession when the officer testifies the confession was secured without the use of threats, coercion, or promises of immunity or a less severe penalty. *State v. Boggs*, 218 Ariz. 325, ¶ 44, 185 P.3d 111, 121 (2008). We will uphold a trial court's findings on the voluntariness of a confession as long as they are supported by sufficient evidence. *State v. Rhymes*, 129 Ariz. 56, 57, 628 P.2d 939, 940 (1981). A confession is involuntary, however, if it results from "impermissible police conduct" or "coercive pressures that are not dispelled." *State v. Amaya-Ruiz*, 166 Ariz. 152, 164, 800 P.2d 1260, 1272 (1990).

¶21 In essence, the detectives testified that Amavisca was neither coerced nor induced to make incriminating statements. That testimony established a prima facie case for admission. *See State v. Ellison*, 213 Ariz. 116, ¶ 31, 140 P.3d 899, 910-11 (2006). Although the detectives told Amavisca he would receive immediate medical attention, they did not condition such treatment, either explicitly or implicitly, on his cooperating with the investigation. The trial court therefore did not abuse its discretion in finding the detectives had neither made promises nor offered benefits to Amavisca in exchange for his statements.

¶22 The record also supports the finding that the statements were not coerced. Mere discomfort and slight health problems do not override the free will of a person who is in custody and render his statements involuntary. *State v. Arnett*, 119 Ariz. 38, 43, 579 P.2d

542, 547 (1978); *e.g.*, *United States v. Coleman*, 208 F.3d 786, 791 (9th Cir. 2000) (heroin withdrawal and physical discomfort insufficient to establish confession involuntary). Here, Amavisca admitted he was not in much pain from the injuries, and the detectives' testimony suggested his injuries were minor and exaggerated. To the extent Amavisca maintains his injuries were more severe and his pain more pronounced, it was the trial court's role to resolve such conflicts in the evidence, and we will not disturb the court's finding that Amavisca was not mistreated by the officers during his arrest. *See Ellison*, 213 Ariz. 116, ¶¶ 32-33, 140 P.3d at 911 (trial court not required to accept defendant's version of events). Thus, the court did not abuse its discretion in finding the environment in which Amavisca gave his statements was not coercive.

Miranda Violation

¶23 In his post-arrest interview, Amavisca was interrogated in a police station by two detectives, one of whom, Detective Diaz, primarily served as a translator. Diaz testified he had been raised in a Spanish- and English-speaking household, he had considered himself bilingual all his life, and he had been certified as a Spanish-speaker by the police department. Before reading the *Miranda* warnings, Diaz first tried to ascertain Amavisca's identity because he had given different names. The detectives then told Amavisca they wanted to ask him questions about the shooting death of his brother. Diaz read Amavisca the *Miranda* warnings once in Spanish and, when Amavisca indicated he did not understand them, Diaz read the warnings again. In the second reading, Diaz went through the *Miranda* warnings

line by line, explained to Amavisca those provisions that confused him, and asked Amavisca if he understood each aspect of his rights. Amavisca indicated he understood every one of his rights and agreed to answer questions. The detectives began the interview by asking him questions about the murder of his brother; later, they questioned him about the home invasion.

¶24 The trial court found the detectives had not violated Amavisca's rights by asking him questions about his identity before reading him the *Miranda* warnings. The court further found that Amavisca had been properly informed of his rights pursuant to *Miranda* and had knowingly, intelligently, and voluntarily waived his right to remain silent. Amavisca argues that his rights were violated due to (1) the detectives' delay in reading the *Miranda* warnings; (2) the language barrier and "incompetence of the translator" causing him not to understand his rights; (3) his lack of "opportunity to appreciate and evaluate whether to . . . waive his rights"; (4) the "ruse" used by the detectives in speaking about the death of his brother to obtain incriminating statements from Amavisca concerning the home invasion; and (5) the implication that he would receive medical treatment if he talked to the detectives.[5] We have previously disposed of the latter argument, finding that the detectives in no way

[5]Amavisca also argues the detectives improperly questioned him about his family. The questions he challenges, however, were asked well after he had been advised of and waived his right to remain silent. Accordingly, they have no bearing on whether the detectives secured a waiver of his right to remain silent through improper means.

conditioned medical attention on Amavisca's cooperation in the interview. We address his other arguments in turn.

¶25 *Miranda* requires police officers to provide express warnings to suspects when they are interrogated in police custody in order to preserve their right against self-incrimination. 384 U.S. at 478-79. "If the accused has been given his *Miranda* warnings and makes a voluntary, knowing, and intelligent waiver of those rights[,] . . . statements [made to police officers] are admissible." *State v. Smith*, 193 Ariz. 452, ¶ 29, 974 P.2d 431, 438 (1999). "In reviewing a waiver of the rights to counsel and silence, courts consider the totality of the circumstances." *State v. Jones*, 203 Ariz. 1, ¶ 7, 49 P.3d 273, 276 (2002).

¶26 Although Amavisca asserts the detectives should have read him the warnings "[a]t the outset of his interrogation," he has failed to develop properly this point in his opening brief. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (brief must contain argument with citations to record and supporting authorities). He has not specified what pre-*Miranda* questions he believes constituted "interrogation." Nor has he identified any specific pre-*Miranda* statements he made that were admitted into evidence in violation of his rights. Moreover, questions seeking basic biographical information are "normally attendant to arrest and custody" and thus do not constitute "interrogation" for purposes of *Miranda*. *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980); *see United States v. Rodriguez*, 356 F.3d 254, 259 n.2 (2d Cir. 2004). Preliminary questions to ascertain the identity of a person in custody

generally do not require that *Miranda* warnings have been read. *State v. Landrum*, 112 Ariz. 555, 559, 544 P.2d 664, 668 (1976). The trial court did not err, therefore, in denying the motion to suppress because the *Miranda* warnings were not read sooner.

¶27 Amavisca has likewise failed to offer any support for his claim that a "language barrier" or an "incompeten[t] . . . translator" caused him not to understand the rights he was waiving. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi). Amavisca has not suggested on appeal that Detective Diaz inaccurately translated any particular word or phrase during the interview. Indeed, the record indicates Diaz was bilingual and served as a competent translator. Moreover, Diaz read the *Miranda* warnings twice in Spanish from a standard card and explained them at length after Amavisca expressed confusion about them. The record therefore does not support Amavisca's bare assertion that he was given no opportunity to "appreciate and evaluate" his rights. Rather, the record supports the trial court's finding that Amavisca fully understood his rights when he waived them.

¶28 Amavisca's final contention—that his waiver was not voluntary because he believed he would only be talking about the murder of his brother and did not understand that he could incriminate himself for the home invasion—does not provide a sufficient ground for reversal. *Miranda* warnings apprize defendants of their rights to silence and counsel during police questioning, and the warnings ensure knowing and voluntary waivers of these rights by alerting those questioned to the critical fact that anything they choose to say may be used against them. *Colorado v. Spring*, 479 U.S. 564, 574-75 (1987). A suspect's

awareness of the possible subjects of police questioning is therefore not required for the waiver of a Fifth Amendment privilege to be valid. *Id.* at 577; *State v. Walden*, 183 Ariz. 595, 610, 905 P.2d 974, 989 (1995), *overruled in part on other grounds by State v. Ives*, 187 Ariz. 102, 927 P.2d 762 (1996). Although A.R.S. § 13-3988(B)(2) requires a court when making a voluntariness determination to consider a defendant's knowledge of his suspected crimes, this factor alone is not conclusive. *See* § 13-3988(B)(5). The trial court here indicated it had read the entire transcript of Amavisca's interview with the detectives. Because trial courts are presumed to know and properly apply the law, *State v. Trostle*, 191 Ariz. 4, 22, 951 P.2d 869, 887 (1997), we conclude the court did not abuse its discretion in finding, under the totality of the circumstances, that Amavisca's waiver of his Fifth Amendment rights was knowing, voluntary, and intelligent.

Disposition

¶29 For the foregoing reasons, Amavisca's convictions and sentences are affirmed.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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JOSEPH W. HOWARD, Judge