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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. MIGUEL MANOLITO PEREZ, Appellant.	2 CA-CR 2010-0039 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20055042

Honorable Stephen C. Villarreal, Judge
Honorable Deborah Bernini, Judge
Honorable Richard S. Fields, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Diane Leigh Hunt
Tucson
Attorneys for Appellee

West, Christoffel & Zickerman, PLLC
By Anne Elsberry
Tucson
Attorneys for Appellant

V Á S Q U E Z, Presiding Judge.

¶1 In this appeal from his convictions for sale of drugs, attempted sale of drugs, and trafficking in stolen property, appellant Miguel Perez argues his due process rights were violated by the state's failure to disclose the identity of a confidential

informant and the trial court's refusal to require the informant to testify at trial. Because we conclude any error was harmless, we affirm.

Background

¶2 "We view the evidence in the light most favorable to upholding the jury's verdict[s]." *State v. Mangum*, 214 Ariz. 165, ¶ 3, 150 P.3d 252, 253 (App. 2007). Perez sold or traded crack cocaine to an undercover police officer on five occasions in October and November 2005. In December 2005, the officer "decided to . . . end the case" and arranged to meet with Perez to exchange guns for crack cocaine. Perez was arrested at that meeting and later charged with six counts of sale of a narcotic drug, two counts of possession of a narcotic drug for sale, and attempted trafficking in stolen property.

¶3 Perez's first trial ended in a mistrial when the jury was unable to reach a verdict. After a second trial, Perez was convicted of three counts of sale of a narcotic drug, one count of attempted sale of a narcotic drug, and one count of attempted trafficking in stolen property. The trial court imposed concurrent, partially mitigated sentences, the longest of which are 12.5-year prison terms. This appeal followed.

Discussion

¶4 On appeal Perez argues his due process rights were violated "when the State failed to disclose the existence of a confidential informant," when the "informant lied under oath regarding his involvement in entrapping Perez," and when "the trial court subsequently precluded [Perez] from calling the informant as a witness." Before we address these issues, some additional procedural history is required.

¶5 Before his first trial, Perez filed a "Motion to Produce Informant," arguing the informant was "a percipient witness" pursuant to *Roviaro v. United States*, 353 U.S. 53 (1957). The confidential informant had been involved in several drug transactions between Perez and police officers before the charged offenses occurred, and Perez maintained "[t]he State cannot avoid producing [him] simply because it chose not to charge [Perez] . . . with three offenses that occurred before the original date in the charging indictment." And he argued information about the informant was necessary to his entrapment defense.

¶6 After a hearing on the motion, the trial court denied it, concluding Perez had not shown the informant would provide "evidence that is material to his defense of entrapment." The court reasoned that the informant had not been "a material witness to the charged offenses" and that Perez had failed to provide "adequate, non-speculative indications . . . that the informant somehow acted to entrap [him]." Perez moved for reconsideration, arguing *State v. Robles*, 182 Ariz. 268, 895 P.2d 1031 (App. 1995), on which the court had relied, was distinguishable because the informant in that case had only introduced the officer and defendant and, unlike the informant in Perez's case, had not been part of any drug sales and was not therefore "a percipient witness." The court again denied the motion.

¶7 Although the record is unclear as to when or why, the trial court subsequently allowed Perez to depose M., the individual Perez had come to believe had been the confidential informant. M. denied being a confidential informant. The state moved to preclude M. as a witness, and the court granted the motion, noting that no one

other than Perez's codefendant had been "present during any of the four encounters between [the officer] and Mr. Perez that are alleged in the indictment," and concluding that M. "has nothing relevant to offer. Nothing about his preclusion [as a witness] will prejudice the Defendant at trial."

¶8 At Perez's first trial, however, an officer testified M. had been working with them and had been present at drug buys that had taken place before the charged offenses. After the mistrial, Perez again moved for disclosure of information about M. and to interview the officers involved in the case about M. The trial court denied the motion to interview the officers, but did order the state to provide Perez with "disclosure regarding [his] prior case file and the police reports of the previous uncharged undercover sales."

¶9 At Perez's second trial, officers involved in the case testified M. had provided the information that started the investigation, had been involved in the investigation, and had been present at drug transactions that took place before the charged offenses. Perez renewed his motion to call M. as a witness, and the trial court denied it.

¶10 As noted above, in several overlapping and sometimes confusing arguments, Perez contends his due process rights were violated in several regards. Although the state argues Perez has forfeited these claims by failing to raise them below, and Perez himself has cited only the standard for fundamental error review in his brief on appeal, we disagree that he has forfeited this argument on appeal. The record shows Perez argued strenuously that the state was required to disclose the identity of its confidential informant, that the state acted wrongfully in allowing M. to lie about his role

as an informant at his deposition, and repeatedly urged the trial court to allow him to call M. as a witness at trial to support his entrapment defense. We therefore review the refusal to disclose the informant's identity and the court's decision to preclude M.'s testimony for an abuse of discretion. *See State v. Tuell*, 112 Ariz. 340, 342-43, 541 P.2d 1142, 1144-45 (1975) (trial court's refusal to order disclosure of informant's identity reviewed for abuse of discretion); *see also State v. Garza*, 216 Ariz. 56, ¶ 37, 163 P.3d 1006, 1016 (2007) ("We review evidentiary rulings for abuse of discretion.").

¶11 Perez argues the state "failed to disclose that [M.] was a confidential informant" and violated the rule set forth in *Brady v. Maryland*, 373 U.S. 83 (1963), creating an "edifice based on unfairness" that "result[ed] in the preclusion of [M.'s] testimony." "Disclosure of the existence of an informant or of the identity of an informant who will not be called to testify" is not required if "disclosure would result in substantial risk to the informant or to the informant's operational effectiveness, provided the failure to disclose will not infringe the constitutional rights of the accused." Ariz. R. Crim. P. 15.4(b)(2); *see also Tuell*, 112 Ariz. at 343, 541 P.2d at 1145.

> An appellant seeking to overcome the state's policy of protecting an informant's identity, has the burden of proving that the informant is likely to have evidence bearing on the merits of the case. The appellant need not prove that the informer would give testimony favorable to the defense in order to compel disclosure of his identity; nor need he prove that the informer was a participant in or even an eye witness to the crime. His burden extends only to a showing that, in view of the evidence, the informer would be a material witness on the issue of guilt which might result in exoneration and that nondisclosure of his identity would deprive the defendant of a fair trial.

Tuell, 112 Ariz. at 343, 541 P.2d at 1145 (citation omitted). Even assuming Perez had met his burden in this regard,[1] however, it appeared Perez knew who the informant was even before his first trial, M.'s identity was ultimately disclosed, and Perez deposed him. And, "[a] defendant who knows the identity of the informer ordinarily will not be prejudiced by a refusal to disclose that identity." *People v. Williams*, 63 Cal. Rptr. 501, 505 (1967); *see also Robles*, 182 Ariz. at 271, 895 P.2d at 1034 (rejecting claim of error in failing to order disclosure when record showed defendant knew informant's identity).

¶12 Perez also maintains the state "allow[ed] false evidence to be presented, without controverting it" and thereby convicted him through "the use of false evidence." M.'s statements in his deposition that he had not worked for the police as an informant were, based on the officers' testimony at trial, apparently untruthful. But, that evidence was not used at the trial at which Perez was convicted. Perez has cited no authority to support the proposition that the giving of false testimony that is not used at trial results in a due process violation.

¶13 Moreover, any error in the preclusion of M.'s testimony was harmless. *See State v. Henderson*, 210 Ariz. 561, ¶ 18, 115 P.3d 601, 607 (2005) (error harmless when it did not "contribute to or affect the verdict"). Perez's defense at trial was that M. had "entrapped" him by telling him he owed money for drugs and the people to whom he owed the money were "going to hurt [M.'s] son" if he did not take care of the debt. In

[1]Perez presented the trial court with an affidavit in which he averred M. had "entrapped [him] and introduced [him] to a person" he later discovered was a police officer. *See State v. Grounds*, 128 Ariz. 14, 15, 623 P.2d 803, 804 (1981) (requiring defendant to present evidence in support of request to disclose informant's identity in a form such as "sworn affidavits, stipulated facts, depositions, and oral testimony").

order to establish entrapment, a defendant must "prov[e] . . . by clear and convincing evidence" that "[t]he idea of committing the offense started with law enforcement officers or their agents," that "law enforcement officers or their agents urged and induced the person to commit the offense," and that "[t]he person was not predisposed to commit the type of offense charged before the law enforcement officers or their agents urged and induced the person to commit the offense." A.R.S. § 13-206(B).

¶14 Here, there was ample evidence that Perez was predisposed to selling drugs, including convictions for drug offenses in 2001, testimony that Perez had been involved in drug transactions before his 2001 convictions, and evidence that the amount and type of money found on Perez at the time of his arrest was consistent with someone who sold drugs. Perez himself admitted that, at the time of the charged offenses, he had been using drugs and had possessed them for personal use. Officers also testified they had received information from M. that Perez was selling drugs to people both before the transactions that were the subject of the instant investigation and to others at the time of the investigation. Perez does not challenge this testimony on appeal nor argue that M. would have testified otherwise.

¶15 Perez was required to show by clear and convincing evidence that he was not predisposed to sell drugs to the officers in order to establish the affirmative defense of entrapment, *see* § 13-206(b)(3), and nothing Perez argues about M.'s possible testimony relates to predisposition. Thus, even if M.'s testimony could have changed the jury's conclusion as to inducement, we cannot say it would have affected the verdict based on

clear evidence of Perez's predisposition to commit the offenses. *See Robles*, 182 Ariz. at 271, 895 P.2d at 1034.

Disposition

¶16 Perez's convictions and sentences are affirmed.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge