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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THE STATE OF ARIZONA, Appellee, v. JUAN ANGEL RUIZ, Appellant.	2 CA-CR 2010-0346 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20100857001

Honorable John S. Leonardo, Judge

AFFIRMED

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H O W A R D, Chief Judge.

¶1 After a jury trial, appellant Juan Ruiz was found guilty of burglary of a residential structure and sentenced to the presumptive prison term of 6.5 years. On appeal, Ruiz argues the trial court erred by allowing inadmissible testimony and refusing to give a requested jury instruction. Because the trial court did not err, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the verdicts. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). Ruiz threw a rock through the window of a house and stole a television and some money. A fingerprint technician identified fingerprints left on the blinds on the inside of the broken window as matching Ruiz's fingerprints. Ruiz was convicted and sentenced as stated above, and this appeal followed.

Admissibility of Testimony

¶3 Ruiz argues the trial court erred in admitting statements by the fingerprint technician who compared fingerprints found at the house to fingerprints from a database, and then compared fingerprints from the database to fingerprints taken by a sheriff's deputy. Ruiz first contends testimony referring to the fingerprints from the database was inadmissible hearsay and lacked foundation. However, he fails to cite to any authority on hearsay or foundation aside from the standards of review. Therefore, Ruiz has waived these issues on appeal. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (argument shall contain "citations to the authorities, statutes and parts of the record relied on"); *State v. Bolton*,

182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (issue waived when argument insufficient to permit appellate review).

¶4 Ruiz also maintains the admission of testimony regarding the fingerprints from the database violated the Confrontation Clause. We review challenges to the admissibility of evidence under the Confrontation Clause de novo. *State v. Martin*, 225 Ariz. 162, ¶ 16, 235 P.3d 1045, 1049 (App. 2010).

¶5 Under the Confrontation Clause of the Sixth Amendment, testimonial hearsay may not be admitted "unless (1) the declarant is unavailable and (2) the defendant 'had a prior opportunity to cross-examine' the declarant." *State v. Armstrong*, 218 Ariz. 451, ¶¶ 31-32, 189 P.3d 378, 387 (2008), *quoting Crawford v. Wash.*, 541 U.S. 36, 59 (2004). Under *Crawford*, testimony is "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *State v. Boggs*, 218 Ariz. 325, ¶ 56, 185 P.3d 111, 123 (2008), *quoting Crawford*, 541 U.S. at 51 (alteration in *Boggs*). The Supreme Court has held that prior testimony, depositions and affidavits are testimonial. *State v. Gomez*, 226 Ariz. 165, ¶¶ 8-9, 244 P.3d 1163, 1165 (2010), *relying on Crawford*, 541 U.S. at 51-53. More specifically, the Supreme Court held that expert affidavits affirming the results of a forensic drug test were testimonial when they were prepared for the purpose of trial. *Melendez-Diaz v. Mass.*, ___ U.S. ___, 129 S. Ct. 2527, 2532 (2009); *Gomez*, 226 Ariz. 165, ¶¶ 8-9, 244 P.3d at 1165.

¶6 Ruiz does not identify clearly what portion of the testimony violated his rights under the Confrontation Clause. However, because the fingerprint technician

testified at trial, Ruiz had an opportunity to cross-examine her on her observations and opinions. *See Armstrong*, 218 Ariz. 451, ¶¶ 31-32, 189 P.3d at 387. And although Ruiz argues the "assertion is that the [database] prints belong to Mr. Ruiz," he has not established that the database was prepared for the purpose of trial or otherwise falls within the definition of testimonial. *See Gomez*, 226 Ariz. 165, ¶¶ 8-9, 244 P.3d at 1165. Moreover, Ruiz errs to the extent he contends the database fingerprints themselves violated the Confrontation Clause. Those prints had no independent significance but were merely a bridge between the latent and rolled prints. Additionally, they were not admitted into evidence. *See Armstrong*, 218 Ariz. 451, ¶¶ 31-32, 189 P.3d at 387. Thus, the trial court did not err by admitting the fingerprint technician's statements. *See Martin*, 225 Ariz. 162, ¶ 16, 235 P.3d at 1049.

Jury Instruction

¶7 Ruiz next argues the trial court erred by denying his requested jury instruction on the fingerprint evidence.[1] We review a court's denial of a requested jury instruction for an abuse of discretion. *State v. Dann*, 220 Ariz. 351, ¶ 51, 207 P.3d 604, 616-17 (2009).

¶8 "A party is entitled to an instruction on any theory of the case reasonably supported by the evidence." *State v. Bolton*, 182 Ariz. 290, 309, 896 P.2d 830, 849

[1]Ruiz also argues the court's denial of his request for the instruction violated his constitutional right to present a defense. However, Ruiz did not make this argument in the trial court, nor does he cite to any authority supporting that argument on appeal. Thus, he has waived this argument. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (issue waived when argument insufficient to permit appellate review).

(1995). However, a trial court is not required to give every instruction requested by a defendant and need not give an instruction if "its substance is adequately covered by other instructions." *State v. Rodriguez*, 192 Ariz. 58, ¶ 16, 961 P.2d 1006, 1009 (1998). Instead, we review whether the jury instructions as a whole correctly state the applicable law. *Id.*

¶9 Ruiz's requested instruction stated:

> You are the sole judges of the facts and the court expresses no opinion on the accuracy or credibility of the fingerprint evidence in this case. However, if you find that the only evidence linking the defendant to the charged offense is the fingerprint evidence, then such evidence is not sufficient to prove guilt beyond a reasonable doubt unless it is proven that the fingerprints were found in a place and under circumstances where they could not have been made at the time or place other than during the commission of the offense.

The trial court denied Ruiz's request for the instruction, stating that another instruction covered the same issue. The court instructed:

> Guilt cannot be established by the defendant's mere presence at a crime scene, mere association with another person at a crime scene, or mere knowledge that a crime is being committed. The fact that the defendant may have been present, or knew that a crime was being committed, does not in and of itself make the defendant guilty of the crime charged. One who is merely present is a passive observer who lacked criminal intent and did not participate in the crime.

The court also gave the standard reasonable doubt instruction pursuant to *State v. Portillo*, 182 Ariz. 592, 596, 898 P.2d 970, 974 (1995).

¶10 Ruiz's requested instruction required the jury to find the fingerprints were made at the time and location of the offense. The trial court instead instructed the jury that Ruiz's mere presence at the crime scene was insufficient to establish guilt. And although Ruiz contends the court's instruction did not cover a situation where he had been present at the crime scene at a different time, the court did not limit its instruction to presence during the commission of the crime. Additionally, the jury was instructed on reasonable doubt. The court was not required to tailor the reasonable doubt instruction to the defendant's particular defense. *See State v. Nordstrom*, 200 Ariz. 229, ¶ 85, 25 P.3d 717, 742 (2001). If the jury had found that the prints could have been made at a time other than the burglary, it would have had to acquit Ruiz. But the victims testified they did not know him or give him permission to be in their home, and the jury believed them. Therefore, the substance of Ruiz's requested instruction was covered by the court's other instructions. *See Rodriguez*, 192 Ariz. 58, ¶ 16, 961 P.2d at 1009.

¶11 Ruiz further contends the trial court should have given his instruction because it was a clarification of the law based on *State v. Brady*, 2 Ariz. App. 210, 213, 407 P.2d 399, 402 (1965). First, we discourage the use of jury instructions quoting our opinions. *State v. Rutledge*, 197 Ariz. 389, ¶ 11, 4 P.3d 444, 447 (App. 2000). In *Brady*, the court considered the sufficiency of the evidence and held that in that particular case "the fingerprints . . . were not found in a place and under circumstances where they could have been reasonably made at a time other than the time of the commission of the offense." 2 Ariz. App. at 213, 407 P.2d at 402. *Brady* did not suggest its language

should be used in jury instructions nor did it hold that other ways of stating the same proposition would be invalid. *See id.* The trial court did not err in denying Ruiz's request for a jury instruction on the fingerprint evidence. *See Dann*, 220 Ariz. 351, ¶ 51, 207 P.3d at 616-17.

Conclusion

¶12 For the foregoing reasons we affirm Ruiz's conviction and sentence.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge